

1 ARIZONA DEPARTMENT OF FINANCIAL INSTITUTIONS

2 In the Matter of the Removal and Prohibition of:

3 **MONICA LOPEZ**
4 6875 N. Oracle Road, Suite 105
5 Tucson, AZ 85704

6 Respondent.

No. 09F-BD036-BNK

**SUPERINTENDENT'S FINAL
DECISION AND ORDER**

7 The Superintendent of Financial Institutions (the "Superintendent"), having reviewed the
8 record in this matter including the exhibits, transcripts of the February 18, 19 and 20, 2009 and
9 March 5 and 6, 2009 administrative hearings ("Transcripts"), and the recommended decision of the
10 Administrative Law Judge ("ALJ") attached and incorporated herein by this reference, adopts in
11 part, rejects in part and modifies in part the ALJ's recommended decision and issues this Final
12 Findings of Fact, Conclusions of Law and Order as follows.

13 **FINDINGS OF FACT**

14 **Background**

15 1. The Arizona Department of Financial Institutions ("Department") is authorized to
16 license, examine, investigate and supervise all persons engaged in the escrow agent business and
17 enforce the statutes, rules and regulations relating to escrow agents pursuant to A.R.S. §§6-801
18 thru 6-847.05, *et seq.*

19 2. Upon a finding of wrongdoing, the Superintendent may order the removal and
20 prohibition of any escrow employee from further participation in any manner in the conduct of the
21 affairs of any financial institution or enterprise pursuant to A.R.S. § 6-161.

22 4. Title Security Agency ("TSA") is licensed by the Department as an escrow agent,
23 license number EA-0001723. TSA is an Arizona corporation. TSA is not exempt from licensure
24 as an escrow agent within the meaning of A.R.S. § 6- 801.

25 5. Respondent Monica Lopez ("Ms. Lopez") is employed as an escrow officer at TSA,
26 branch #5591.

1 6. Vivian Boggie, Executive Vice President of TSA is employed as manager in charge of
2 TSA's Southern Arizona offices and as such had direct supervisory responsibility for management
3 of Respondent. (Transcript March 5, 2009, p. 145 5 - 8)

4 7. The Department initiated an examination of TSA's business affairs on November 5,
5 2007 pursuant to A.R.S. 6-122 (B)(3). On April 16, 2008 and following receipt of a complaint, the
6 Department extended its examination to include an investigation of escrow transactions performed
7 by Ms. Lopez at TSA's Cases Adobes Branch in Tucson, Arizona. As a result of the examination
8 and investigation, the Department filed its Notice of Hearing and Complaint for this matter dated
9 October 16, 2008 ("Notice of Hearing"). The Notice of Hearing describes the Department's
10 findings and respondent's unlawful activities and omissions occurring over multiple dates in 2006.

11 8. Respondents filed an answer on November 13, 2008 denying the Department's
12 findings. The matter was set for hearing over several days before the Office of Administrative
13 hearings, an independent state agency.

14 9. A hearing commenced on February 18, 2009 and continued each day until February 20,
15 2009. Since the parties did not conclude their presentation of evidence, a further hearing was held
16 on March 5, 2009 and continued through March 6, 2009. The Department presented the testimony
17 of Richard Carpenter, Robert Charlton, Jeffrey Gaia, Clyde Granderson, Isaac Horner, Monica
18 Lopez, Thomas Morales, Frank Padilla, Stephen Thompson, Anna Valenzuela, and Christian
19 Woolley and admitted into evidence exhibits as noted in the Transcripts. Respondent presented the
20 testimony of Vivian Boggie, Chris Ludwig, Kenneth Scott, and Dan White and admitted into
21 evidence exhibits as noted in the Transcripts.

22 **Report of Examination and Investigation of Violations**

23 10. Examiner Richard Carpenter's narratives and report of his investigation of violations
24 admitted into evidence as Exhibits A, B, D, E, F, G, and H. Richard Carpenter ("Carpenter") has
25 been employed by the Department for forty (40) years; the last ten (10) of those years have been
26 primarily focused on the examination and investigation of title companies that perform escrow
27 transactions and escrow licensees. The narratives set forth numerous violations of the law, statutes
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1 and rules regulating Ms. Lopez's conduct as TSA's escrow officer employee.

2 11. Examiner Carpenter's narratives and his testimony specified that Ms. Lopez:

- 3 a. Failed to account properly for escrow property as required by the terms of the
- 4 escrows;
- 5 b. Failed to disburse funds in accordance with the provisions of the HUD-1 escrow
- 6 settlement statement;
- 7 c. Disbursed escrow monies contrary to the provisions of the HUD-1 escrow
- 8 settlement statement;
- 9 d. Failed to maintain an adequate internal control structure as prescribed by A.R.S. § 6-
- 10 841;
- 11 e. Failed to follow written escrow instructions¹;
- 12 f. Disbursed escrow proceeds absent adequate escrow instructions²; and
- 13 g. Failed to obtain prior instructions and authorization for the disbursement of escrow
- 14 funds to a third party who was not a party to the escrow³.

15 12. Examiner Carpenter, by examining the many documents contained in the Lopez escrow
16 files, completed narratives of the information that were placed in evidence by the Department (Exs.
17 A, B, D, E, F, G, and H, [Transcript of February 20, 2009, pp. 170 & 175]). Examiner Carpenter
18 identified that Ms. Lopez failed to account properly for escrow property as required by the terms of
19 the escrows in that the Certification of Accuracy to the HUD-1 Settlement statements prepared for
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22 ¹ The actions of a fiduciary require that the escrow agent must be cognizant not only of the escrow instructions
23 but of the provisions contained in the documents that are deposited in escrow. If there is a significant variance
24 between the two, the escrow agent has a remedy. When the terms of the instruments, or any other fact known
25 to the escrow agent, including the documents deposited in escrow, "present an ambiguity of interpretation as to
the intention" of the parties, the agent has a "duty to call its principal[s] for clarification." *Gardenhire v.*
Phoenix Title & Trust Co., 11 Ariz.App. 557, 559, 466 P.2nd at 776, 778 (1970), *Burkons v. Ticor Title*
Insurance Company of California, 168 Ariz. 345, 813 P.2d 710

26 ² When the "agent should realize the possibility of conflicting interpretations, ordinarily [it] is not authorized
to act, since it would be [its] duty to communicate with the principal[s] and obtain more definite instructions."
Gardenhire, 11 Ariz.App. at 559, 466 P.2nd at 778 (quoting Restatement (Second) of Agency § 44 comment c)

27 ³ The escrow agent, a fiduciary, must conduct the transaction with "scrupulous honesty, skill and diligence."
D'Ascoli, 94 Ariz. at 234, 383 P.2nd at 121-122.

1 multiple escrows did not reflect Cash-Out⁴ payments to Frank Padilla ("Padilla")(Exs. A-1 and D-
2 1) and failed to account for a \$102,263.23 credit to Ana Elisa Balderrama ("Balderrama") (Exs. F)
3 in direct conflict with the Certification(s) that to the best of their [Seller, Borrower and Ms.
4 Lopez's] knowledge and belief:

5 "the HUD-1 Settlement statement is **a true and accurate statement of all receipts**
6 **and disbursements** made on my account or **by me** in this transaction." (emphasis
7 added) (Exs. A-1, p.5; A-2a, A-21, D-1, p. 5, and F-16).

8 Additional Certifications from Ms. Lopez state:

9 "The HUD-1 Settlement Statement which I have prepared **is a true and accurate**
10 **account of this transaction** (emphasis added). I have caused or will cause the funds
11 to be disbursed in accordance with this statement." (emphasis added), (Exs. A-2a,
12 A-21 and F-16).

13 Ms. Lopez did not deny that she failed to account properly for escrow property as
14 required by the escrows, indeed she failed to deny that her Certifications of Accuracy to the HUD-1
15 Settlement statements and her additional Certifications were untrue. (Transcript of February 18,
16 2009, p. 72, lines 1 - 21) Even though Ms. Lopez and the respective recipients of the unaccounted
17 for escrow property (Padilla and Balderrama) were the only persons that knew the Certifications
18 were untrue, Respondent advanced the theory that, an escrow agent may, even after signing such
19 certifications demanding a true and accurate account of this [the] transaction, disburse escrow
20 property⁵ in a manner that is in conflict with the certifications and the trust; and the reliance placed
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25 ⁴ Cash-Out payments are generally the result of schemes involving either the Seller or Borrower or both that
26 divert funds from an escrow closing under the guise of "improvement" or an unrecorded "investment"
27 affecting the property or when little or no improvement was made or real investment or some other variation of
28 fraud that takes place without the knowledge and consent of all the parties to an escrow, most often the
Lender.

⁵ "Escrow property" means property, money, a written instrument or evidence of title or possession to real or
personal property or any other thing of value. A.R.S. § 6-801(7)

1 in her by the Borrower and the Lender(s) in the escrow arising from actions in direct variance with
2 the statements made on the documents which were the subject of the certifications⁶.

3 13. Examiner Carpenter found that Ms. Lopez failed to disburse funds in accordance with
4 the disclosure contained on the HUD-1 escrow settlement statements she had prepared. In each of
5 the following Exhibits, Ms. Lopez failed to disclose to her employer, the Borrower and the Lender
6 that she had either received during the transaction or expected to receive during the transaction an
7 instruction from the Seller to provide Padilla with proceeds from the escrow. Moreover, at no time
8 did Ms. Lopez cause to appear on any of the HUD-1 settlement statements disclosure of the
9 payments to Padilla. (Exs. A-1, A-2, B-1, D-1, D-2, E-1, F-9, G-1, and H-1).

10 14. Examiner Carpenter found that Ms. Lopez disbursed escrow monies contrary to the
11 provisions of the HUD-1 escrow settlement statements she prepared. In each of the following
12 Exhibits, Ms. Lopez did not disclose to her employer, the Borrower and the Lender that she had
13 either received during the transaction or expected to receive during the transaction an instruction
14 from the Seller to provide Padilla or Balderrama with proceeds from the escrow that she would
15 disburse contrary to the disclosures contained on the HUD-1 settlement statements she prepared.
16 (Exs. A-1, A-2, B-1, D-1, D-2, E-1, F-9, G-1, and H-1). During the testimony she admitted to the
17 Balderrama nondisclosure as a \$102,263.23 "mistake." (Transcript of February 18, 2009, p. 235
18 lines 3-5)

19 15. Examiner Carpenter found that Ms. Lopez failed to maintain an adequate internal
20 control structure as prescribed by A.R.S. § 6-841 by failing to maintain adequate escrow file
21 documentation. The following escrows contained no authorization from Borrower or Lender to
22 make the disbursement to Padilla. [Exhibit A (Escrow #06112866-041-ML), Exhibit B (Escrow
23 #06115700-041-ML), Exhibit D (Escrow #06118349-041-ML), Exhibit E (Escrow #06112875-

25 ⁶ 6-841.01, A. An escrow agent is the trustee of all monies received or collected and held in escrow... Every
26 escrow agent and every officer, director and employee of an escrow agent who has actual knowledge of fraud or
27 dishonesty in the application of escrow monies, owes a fiduciary duty as trustee to the owner of the monies held in
28 escrow.(emphasis added)

1 041-ML), Exhibit G (Escrow #06112873-041-ML) and Exhibit H (Escrow #06112857-041-ML)]⁷.

2 16. Examiner Carpenter found that Ms. Lopez failed to follow written escrow instructions.
3 Ms. Lopez failed to heed the specific instruction from the Lender that stated:

4 "The HUD-1 Settlement Statement must be **completed at settlement and must**
5 **accurately reflect all receipts and disbursements** indicated in these closing
6 instructions and **any amended closing instructions subsequent hereto.**" (emphasis
7 added) (Exs. A-5, A-6, D-8, E-8, E-9, F-20, F-21, and F-22)
8 or that stated:

9 **"!!!ABSOLUTELY NO CHANGES TO FEES ... DOCUMENTS, INSTRUCTIONS OR**
10 **CONDITIONS UNLESS IN WRITING FROM WMC MORTGAGE CORP."**

11 (Exs. H-2 AND H-3)

12 These instructions were in clear conflict with the several amendments of the closing
13 instructions made by Sellers subsequent to receipt into escrow of the Lender's instructions in
14 several of the escrows involving Padilla and the Balderrama escrow. The evidence demonstrates
15 that not once did Ms. Lopez seek clarification from the Lender regarding the conflict. (Exs. A-13,
16 B-6, D-6, E-6, F-14, F-15, G-5, and H-13)

17 Respondent Lopez failed to provide any evidence that clarification had been sought let
18 alone obtained for any of the amended closing instructions that conflicted with the Lender(s)
19 instructions. Indeed, Respondent testified that she did not disclose the existence of the amended
20 closing instructions from Sellers nor did she seek clarification from the Lender(s) with respect to
21 Exs. A-12 and A-13. (Transcript of February 18, 2009, p. 92 lines 9 – 25; p. 93 lines 1 - 4)
22 Respondent did not refute that she sought no clarification from the Borrower nor did she obtain
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25 ⁷ A.R.S. § 6-841, A. An escrow agent shall adopt a systematic internal control structure to ensure that **persons**
26 **employed by or associated with the escrow agent's business do not make significant errors or perpetuate significant**
27 **irregularities or fraud without timely detection.**(emphasis added)
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1 clarification from the Lender(s) with respect to the following Exhibits which were in direct conflict
2 with Lender instructions: Exhibits B-5, B-6, D-5, D-6, E-5, E-6, F-15, and G-5.

3 17. Examiner Carpenter found that Ms. Lopez failed to obtain prior instructions and
4 authorization for the disbursement of escrow funds to a third party who was not a party to the
5 escrow. If we assume arguendo that Respondent may not have fully appreciated the dynamics of
6 the scheme she had become involved with when handling the first Padilla Cash-Out transaction
7 (Exhibit A) , it strains credibility to suggest that an escrow officer with 14 years experience did
8 not realize the clear pattern of conflict with Lender(s) instructions and her fiduciary duty to her
9 Escrow employer, the Borrower and the Lender(s) after the pattern of last minute behavior
10 resulting in unilateral modification of Seller instruction by Seller(s) and Padilla continued over
11 numerous closings as seen in Exhibits B-5, B-6, D-5, D-6, E-5, E-6, F-15, and G-5. Respondent
12 stated clearly during her testimony that she had taken the time to show Mr. Morales, the loan
13 originator, and agent for Woolley (Exs. D-6) (Transcript of February 20, 2009 hearing, p. 162
14 lines 3-4); however, she admitted that she did not show it to the Borrower, Mr. Woolley
15 (Transcript of February 18, 2009, p. 162 lines 8-9). She also admitted she did not show it or call
16 the Lender seeking clarification. (Transcript of February 18, 2009 hearing, p. 161 lines 15-16).
17 The Respondent continued to fail to seek clarification instructions or authorization prior to
18 proceeding to disburse from each of the Lenders involved in subsequent escrows (Exs. E-5, E-6,
19 F-15, and G-5).

20 18. Isaac Horner ("Horner"), the Borrower in Ms. Lopez's initial transaction involving
21 Padilla, testified that he had purchased two other properties with Padilla's "investment group"
22 utilizing a different escrow agent before he closed on the Foothill's property. (Transcript of
23 February 18, 2009, p. 200 lines 12-18). Horner testified he knew Padilla and described the
24 "investment group" as consisting of Tom Morales, Rex Adams, Charlie Bent and Steve
25 Nlastname.⁸

26
27 ⁸ Horner did not know the last name of Steve from the "investment group". (Transcript of February 20, 2009, p. 199 2-
28 25, p. 200 1-25)

1 19. Horner described his closing with Ms. Lopez as one in which Charlie Bent; a member
2 of the "investment group" took over the closing. (Transcript of February 18, 2009, p. 201 lines 1-
3 25, p. 202 line 1) Horner's testimony confirms that Ms. Lopez's failure to disclose the amount of
4 the distribution of proceeds to Padilla based on Seller's instructions impacted Horner as Borrower
5 even in Ms. Lopez's initial Padilla escrow. Horner testified that he was surprised to learn that
6 Padilla would receive a Cash-Out from this closing since he had understood that the so-called
7 investment group (which included Padilla) was to have split the profit on resale not upon
8 acquisition. (Transcript of February 18, 2009, p. 202 lines 5-25, p. 206 lines 1 - 12). Horner's
9 testimony shows that Lopez's failure to ascertain the nature of the Padilla "investment" in the
10 Foothills property exposed her employer, the Borrower and the Lender to direct liability for failure
11 to recognize the existence of and deal with the possible mechanics and materialman liens that may
12 have resulted from incomplete improvements undertaken but not completed at the Foothills
13 property. (Transcript of February 18, 2009, p. 205 lines 22-25, p. 206 lines 1-12) Respondent
14 Lopez testified that she did not believe she had a duty to "investigate" the nature of Padilla's
15 investment in the properties she closed in escrow. If we take the meaning of the word investment
16 to be the use of money for future profit or in other words the outlay of money with the object of
17 making a profit, a 14 year veteran of escrow transactions would in proper discharge of her
18 fiduciary duty seek to determine what form Padilla's outlay of money took in any property in
19 which Padilla was seeking to receive his profit. Was the outlay an advance of funds to acquire the
20 property? Was the outlay an advance of funds to improve the property? Was the outlay capable of
21 being documented (i.e., a promissory note, written agreement, etc.)? Why did Padilla not want to
22 appear on the HUD-1 if the outlay was legitimate? Why wouldn't he walk across the street with his
23 "investment group" partner Adams and get a cashier's or counter check out of Adam's closing
24 proceeds? Why did Padilla need to get his disbursement directly from the escrow agent? While
25 these are just a few of the questions an experienced 14 year veteran would ordinarily ask herself in
26 order to discharge her fiduciary duty to understand the risks associated with accommodating the
27 seller's last minute instruction in the final stages of an escrow funding, Respondent testified that

1 she did not think that the Padilla disbursements needed to appear on the HUD-1's. (Exhibit H-2,
2 Transcript of February 18, 2009, p. 251 lines 14-25, p. 252 lines 1 - 22) When asked whether she
3 called the Lender (WMC Mortgage Corp.) ... and did she disclose the disbursement to Padilla or
4 ask him [sic] them (WMC Mortgage Corp.) about it?⁹ Respondent replied that she had not done
5 so. When asked whether she had sought clarification from any Lender on any of the Padilla
6 transactions she replied "No." (Transcript of February 18, 2009, p. 254 lines 4 - 9).¹⁰ When asked
7 whether any of the Seller instructions to pay Padilla arrived after the money was disbursed to
8 Seller. Respondent answered "No." (Transcript of February 18, 2009, p. 283 lines 7 - 22).

9 20. Respondent Lopez prepared several Affidavits of Property Value which require
10 information relating to the manner in which the property is to be occupied. The Affidavits of
11 Property Value were prepared by Ms. Lopez for the Borrowers in the Padilla transactions. In the
12 four Padilla transactions involving Mr. Christian P. Woolley ("Woolley"), Ms. Lopez testified that
13 she prepared Exhibit H-13, an Affidavit of Property Value, without reference to the Occupancy
14 Agreement from Lender that was in her escrow file for this closing. (Exs. H-12) See also, Exhibit
15 H-11, Page 4 of 5 under section VIII. Declarations, L., which seeks from the Borrower a response
16 to the following question: Do you intend to occupy the property as your primary residence?
17 Borrower Checked ☒ yes. Respondent Lopez admitted box seven on the Affidavit of Property
18 Value she had prepared for the closing and recorded had been left blank. She also admitted it had
19 been checked off on all the others she had handled for the Padilla transactions (Transcript of
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21 ⁹ Ms. Lopez had signed and accepted to be bound as a fiduciary under the Closing Instructions from WMC Mortgage
22 Corp that clearly instructed her as follows: **“!!!ABSOLUTELY NO CHANGES TO FEES ... DOCUMENTS,
INSTRUCTIONS OR CONDITIONS UNLESS IN WRITING FROM WMC MORTGAGE CORP.”**(emphasis
added) (Exs. H-2 AND H-3)

23 ¹⁰ In this matter (Exs. H-2 and H-3), ample evidence exists that Ms. Lopez, as Escrow Agent with 14 years experience,
24 knew from multiple instances that preceded this escrow, actual facts about the transactions. She knew before closing that
25 escrow instructions from Seller would, based on multiple iterations that occurred before, be presented to her ("at the
26 closing table") that would be in direct conflict with escrow instructions from Lender. Evidence shows that Escrow Agent
27 Lopez withheld evidence of non-compliance with Lender instructions from her employer as well as parties to the escrows.
28 Ms. Lopez had an absolute duty as a fiduciary to disclose the conflict and she had a remedy she chose not to employ. She
could have called on the escrow parties to provide her with clear instructions on how to proceed. Absent clarification and
authorization from the parties, Respondent was simply not authorized to proceed with the closing. Her election to proceed
with the closing demonstrates a blatant disregard of the duties of a prudent person, the fiduciary. She chose to put her
employer, as well as all the parties to the escrow at grave risk of loss in exchange for her monetary benefit from yet
another Padilla closing valued at \$550,000 against her monthly quota.

1 February 18, 2009, p. 262 lines 1 - 22). When asked whether she had picked up on the fact that in
2 all four of the Woolley loans she closed for the Padilla transactions, she had prepared Affidavits
3 of Property Value for Woolley that indicated each would be his "primary residence"? Ms. Lopez
4 said: "No I did not". (Transcript of February 20, 2009, p. 270 lines 20 - 23). The omission of the
5 information ordinarily contained in box 7 on the Affidavit of Property Value prepared for
6 execution at Mr. Woolley's closing on this the Suntan Drive property is notable when contrasted
7 against the statement Woolley made under oath in Exhibit H-9 (Exs. H-9, p.4 lines 21 - 25)
8 leaving box 7 blank which would have affirmatively stated that the Suntan Drive property was to
9 be Woolley's principle residence permits the public record to remain unclear about the status of
10 occupancy. Moreover, Woolley would not be submitting a document to his Lender that was in
11 conflict with the representation made in the Loan application (Form 1003) (Exhibit H-11, Page 4
12 of 5, section VIII. Declarations, L) In Exhibit H-9, Woolley states clearly, Padilla told me if I
13 bought the Suntan Drive Property **he would rent it himself, and eventually buy it from me.**
14 (emphasis added) and further from Exhibit H-9: "...the Suntan Drive Property was to be my
15 primary residence. **None of this was true.**" (emphasis added)(Exs. H-9, p.5 lines 9 - 17)
16 Evidence provided by testimony at the Hearing in this matter demonstrates clearly that Woolley
17 would not and could not have been the occupant since the property was indeed occupied by
18 Padilla. At the hearing, during questioning by Counsel for Respondent, Padilla testified as
19 follows:

20 Transcript of February 19, 2009 hearing, p. 46, lines 3 - 5

21 Q. And that indictment had Count I conspiracy; do you remember that?

22 A. Yes

23 Transcript of February 19, 2009 hearing, p. 46, lines 16 - 19

24 Q. And the Suntan - and it explained that part of the indictment with regard to
25 the Suntan property -

26 A. That was my rental property. That's the one I was renting.
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1 Padilla removes the veil that allows the conclusion that Woolley was correct when he
2 said "None of this was true." Woolley's Form 1003's were fallacious as to intent to occupy and the
3 Affidavit of Property Value that had been prepared by Ms. Lopez and recorded with a blank box 7
4 indeed was consistent with Padilla's own words from Tucson Federal Camp, where Padilla is
5 serving a prison sentence. "That's the one I was renting." (Transcript of February 19, 2009, p. 46,
6 lines 18 - 19)

7 21. Anna Valenzuela ("Ms. Valenzuela"), testified that she had been an escrow officer
8 with Ticor Title Agency from 2003 through April 2006. Ms. Valenzuela met Padilla at Ticor in
9 August 2003 when she had been in the escrow industry for nine years. She represented that she
10 closed 10 escrows involving Padilla from 2004 through 2006. She admitted that she did not
11 disclose Padilla in any way on any HUD-1s."(Transcript of February 20, 2009, p. 14 lines 1 - 7)
12 nor did she state that she revised any HUD-1 settlement statements to reflect Padilla's receipt of
13 funds from the escrows. (Exs. A-18 p.2 lines 4 - 8). Following attendance in January or February
14 2006 at a mandatory fraud seminar which included Ticor employees, Ms. Valenzuela stated that
15 she advised Padilla that (i) Ticor would require all disbursements to be included on the HUD-1.
16 Padilla advised her that he "...could not be on the settlement statement because the lender would
17 not approve the loan." and (ii) she would withdraw as escrow agent because it was now our
18 [Ticor's] policy to include all disbursements on the HUD-1/Settlement statement." (Exs. A-18 p. 2
19 lines 18 - 28 & p. 3 lines 1 - 4) Padilla advised Ms. Valenzuela that he would take his business
20 elsewhere. (Exs. A-18 p. 3 lines 1 - 4). The record is clear that the shift in policy forced Ms.
21 Valenzuela to cease activity that was contrary to the law and in conflict with escrow instructions
22 that Ms. Valenzuela had been ignoring. When looking into the light of disclosure, Padilla chose to
23 seek out another enabler. The record is also clear that after the January or February 2006 Tucson
24 mortgage fraud seminar, all Title Insurance agents writing insurance under Ticor's Title Insurance
25 guidelines would no longer be able to meet those guidelines unless they followed Ticor's policy to
26 include all disbursements on the HUD-1/Settlement statements.

27 22. Ms. Valenzuela testified that in all but two of the ten transactions she handled for
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1 Padilla the loan officer was Tom Morales ("Morales") (Exs. A-18, p.2 lines 9 – 10). Respondent
2 Lopez admitted during her testimony that the Padilla was introduced to her by Mr. Morales
3 (Transcripts of February 18, 2009, P.62 lines 1-4). Based on credible testimony and several
4 exhibits in evidence, it is clear that Morales prepared the loan application (Uniform Residential
5 Loan Application, Fannie Mae Form 1003("Form 1003")) used in each of the Padilla transactions
6 that Ms. Lopez closed. Indeed, Morales name and/or name and signature appeared on page 3 or 4
7 of the Form 1003's utilized in each of the Padilla transactions closed by Ms. Lopez (Exs. A-20, B-
8 11, B-12, D-15, E-14, H-11, H-12). The Affidavit of Isaac Horner (Exs. A-16) confirms that
9 Morales completed the Form 1003 for Isaac Horner for properties referred to as 5th Street and
10 Spirit Dancer Properties (Exs. A-16, p. 3 lines 1 – 28, p. 4 lines 1- 28). Padilla submitted an
11 Affidavit that stated Morales completed the Form 1003 for the loan to Isaac Horner on the
12 Foothills property. (Exs. A-17, p. 3 lines 11 – 20) Rex Adams ("Adams") provided statements
13 under oath at a deposition in May 2008 which confirmed that while Morales worked as a loan
14 officer in a mortgage branch office managed by Adams for Choice One Mortgage, Morales
15 completed the Form 1003 for Isaac Horner to obtain the financing utilized to acquire the Foothills
16 property from Adams. (Exs. A-19, p. 61 lines 19 – 25, p. 62 lines 1 – 19).

17 Indeed, Morales himself signed and provided a statement under oath that at the
18 recommendation of Adams, Monica Lopez should be contacted to handle the Padilla transactions
19 after Ms. Valenzuela and Ticor stated they were unable in early 2006 to "do deals" for Padilla.
20 Morales described a meeting at Ms. Lopez's office at which Padilla, Bent and Lopez "...discussed
21 the details of various transactions." and that "...From then on all the deals in which Padilla were
22 [sic] involved closed with Lopez..." (Exs. J, p. 1 lines 21 – 28, p. 2 lines 1 – 13). This evidence
23 was undisputed at the hearing in this matter.

24 23 Mr. Morales was called to testify in this matter by the Department. The Department had
25 no civil action nor was aware of any state or federal criminal action against Mr. Morales at the time
26 of the hearing. Mr. Morales refused to testify based on his Fifth Amendment right. He had however
27 submitted a signed Affidavit referenced above and designated as Exhibit J herein. Mr. Morales had
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1 the opportunity in the administrative hearing to testify but chose to forego such right. In light of the
2 fact that no criminal proceeding was pending against Morales at the time of the administrative
3 hearing in this matter and cognizant that he had of his own free will provided the statements under
4 oath in a civil proceeding that constitute Exhibit J, the Department may and does have a clear right
5 to draw a negative inference from Mr. Morales' silence at the hearing before an administrative
6 hearing officer¹¹. Since the Department is permitted to draw an adverse inference from Mr.
7 Morales' decision to remain silent, Mr. Morales' Affidavit is given full evidentiary weight in this
8 matter (Exs. J).¹² The Morales Affidavit does not stand askew or in contradiction against the
9 statements made by witnesses at the hearing and against Affidavits submitted in this matter;
10 therefore Mr. Morales Affidavit is deemed credible.

11 24. During her testimony at the Hearing in this matter Ms. Lopez admitted that over her 14
12 year career as an Escrow Officer she had not read the HUD-1 instructions. (Transcripts of February
13 18, 2009, p. 284 lines 2-17). Since each residential real estate closing since 1974 has required the
14 use of a HUD settlement statement of some sort this is a telling piece of evidence admitting a
15 significant gap in escrow training which was not filled by either Ms. Lopez, Ms. Boggie or her
16 employer, TSA. She also admits that in none of the six Padilla transactions had she disclosed the
17 payments to Padilla to her Employer, the Borrowers or the Lenders. While her failure to have had
18 training in the application of Regulation X to HUD-1's and HUD-1a's would perhaps explain why
19 she was confused about her duties. It is incumbent on an Escrow Officer to understand a simple
20 truth. The Escrow Officer and her licensed employer act in a fiduciary capacity when discharging
21 their escrow duties.

22 25. Mr. Woolley was very clear in his sworn statements and testimony at the Hearing in
23 this matter Morales prepared the Form 1003 for his loan applications with fallacious information
24 regarding Woolley's income, assets, business interests, and intent regarding occupancy of the
25

26 ¹¹ The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in
27 response to probative evidence offered against them: the Amendment "does not preclude the inference where the
privilege is claimed by a party to a Civil cause." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)

¹² Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551

1 property which would serve as collateral for the loan(s) (Exs. B-13, pp. 3-8).

2 26. Padilla provided a statement under oath that was introduced into evidence at the
3 Hearing in this matter as Exhibit A-17. Padilla testified telephonically at the Hearing (Transcript of
4 February 19, 2009, p. 43 - 84) Padilla testified that during a meeting he had with Morales, he
5 listened in on a telephone conversation between Morales and Ms. Lopez in which Morales stated to
6 Ms. Lopez that Morales would use her services if Ms. Lopez would not allow Padilla's name to
7 appear on the HUD-1. Ms. Lopez denied that any such conversation occurred. The ALJ found Ms.
8 Lopez's testimony more credible than that of Mr. Padilla. Padilla's testimony should be evaluated
9 in light of all the facts. Ms. Lopez adhered to her position that her conscious decisions not to
10 disclose the payouts to Padilla were simply not required by RESPA, or by the clear instructions
11 from the parties to the escrow, nor her fiduciary obligation to all parties to the escrow. Balancing
12 the testimony of both Ms. Lopez and Padilla against the facts in this matter, I find that Padilla's
13 testimony on this specific issue is indeed credible. Common sense would also permit an
14 inescapable conclusion. In light of ten transactions at Ticor preceding the Lopez-Padilla
15 relationship, had Ms. Lopez not been agreeable to Padilla's demands; however communicated to
16 her, that he not appear on the HUD-1s, then someone else would have been sought out to become
17 his enabler. Padilla's testimony that he believes Ms. Lopez was not "aware of what was going on."
18 has no legal relevance to her obligation to discharge her fiduciary duties in a prudent manner to all
19 parties to the escrow.

20 ESCROWS AT ISSUE

21 Real Estate and Mortgage Industry in 2006

22 27. Testimony was introduced that the real estate market in Arizona was booming and it
23 would not be uncommon for investors to be involved in multiple sales transactions and escrows.
24 Testimony was introduced which stated that it was not uncommon for silent investors to be
25 involved in transactions or for seller designated proceeds be paid to third parties at close of escrow.
26 Aside from the testimony of Ms. Valenzuela and her Affidavit, the Respondents evidence for this
27 was superficial and of no real moment since reasonable minds can agree that the time was indeed
28

1 busy for Arizona real estate. The critical issue was whether fiduciary obligations under Arizona
2 law were modified by statute or case decision in light of such heated transactional activity.
3 Moreover, if such modification took place, and it did not, was the law relating to an escrow agent's
4 fiduciary duty diluted or in any way lessened? No evidence of any such change to the fiduciary
5 obligations of an escrow officer or of the escrow licensee was introduced at hearing. While the
6 record does include testimony that it was not unusual to have the same person or same group of
7 persons buying and selling multiple houses or properties, the underlying foundation for all such
8 activity during that time period in escrow is that the escrow agent, a fiduciary, must have
9 conducted transactions during 2006 as a prudent person with "scrupulous honesty, skill and
10 diligence."¹³

11 **Escrow #06112866-041-ML (Escrow No. 1)**

12 28. The escrow opened at TSA on March 17, 2006 under Ms. Lopez as the Escrow Officer
13 and closed on April 7, 2006. The escrow contemplated the transfer of title to the premises
14 commonly identified as 5221 N. Foothills Drive, Tucson, AZ 85718 (the "Property") from Rex C.
15 Adams (hereinbefore called "Adams") to Isaac A. Horner (hereinbefore called "Horner") for a
16 contract sale price of \$1,300,000 (Exs. A-14, A-15). The escrow closing was to utilize financing
17 from Axis Mortgage & Investments ("Axis") for 100% of the contract sale price (i) in the amount
18 of \$ 999,750.00 secured by a note of even amount and a recorded **first** Deed of Trust secured by
19 the Property in the amount of \$ 999,750.00 (Exs. A-5), and (ii) in the amount of \$ 300,250.00
20 secured by a note of even amount and a recorded **second** Deed of Trust secured by the Property in
21 the amount of \$ 300,250.00(Exs. A-6).

22 29. The escrow instructions on March 17, 2006 and at all times prior to April 6, 2006
23 contained no disclosure of any written or other obligation to disburse any funds for any reason to
24 Padilla. The HUD-1 (Exs. A-2) disclosed no such payment to Padilla. TSA, Horner and the Lender
25 received no disclosure on Exhibit A-2 or from any other source that an instruction was accepted by
26

27 ¹³ The escrow agent, a fiduciary, must conduct the transaction with "scrupulous honesty, skill and diligence." D'Ascoli,
28 94 Ariz. at 234, 383 P.2nd at 121-122.

1 Ms. Lopez on April 6, 2009 to divert \$150,000.00 from the escrow to Padilla (Exs. A-12, A-13).
2 The record established at hearing confirms that Ms. Lopez failed to provide notification to Lender
3 after escrow closed on April 7, 2006. Horner testified at hearing that he was surprised to learn that
4 Padilla would receive a Cash-Out from this closing since he had understood that the so-called
5 investment group (which included Padilla) was to have split the profit on resale not upon
6 acquisition. (Transcript of February 20, 2009, p. 202 lines 5-25, p. 206 lines 1 - 12) Horner also
7 testified that it appeared to him the Charles (Carlos) Bent, an associate of Padilla took over the
8 closing process (Exs. A-16, lines 5 – 15).

9 30. Two sets of Lender Closing Instructions were part of the instant escrow file. Axis had
10 provided one set of instructions for each of the loans that constituted the financing for the escrow
11 transaction (Exs. A-5, A-6). Each contained the following specific Closing Instructions for Ms.
12 Lopez and TSA to follow:

13 **“The HUD-1 Settlement Statement must be completed at settlement and must**
14 **accurately reflect all receipts and disbursements indicated in these closing instructions and**
15 **any amended closing instructions subsequent hereto.”** (emphasis added)

16 31. Testimony at the Hearing from Mr. Gaia confirmed that no disclosure about the
17 \$150,000 disbursement to Padilla was made to Axis at settlement or thereafter. The information
18 regarding the \$150,000 disbursement became know to Biltmore Bank after it repurchased the loans
19 after both loans went into default. Mr. Gaia also testified about the need for accurate disclosure on
20 the pre-HUD-1s and the Final HUD-1s in order to accurately document what took place at closing
21 (Transcripts of February 19, 2009, p.145 lines 2-17).

22 32. Mr. Gaia testified that in late May or early June 2006 his Bank revised its closing
23 instructions to instruct an escrow agent to notify the Lender about any Seller designated proceeds
24 payments to third parties when such information first became known at closing (Transcripts of
25 February 19, 2009, p. 174 lines 8-21).

26 **Escrow #06115700-041-ML (Escrow No. 2)**

27 33. The escrow opened at TSA on April 13, 2006 under Ms. Lopez as the Escrow Officer
28

1 and closed on June 12, 2006. The escrow contemplated the transfer of title to the premises
2 commonly identified as 182 Camino Vista Del Cielo, Tucson, AZ 85621 (the "Property") from
3 Jesus M. Castro and Elizabeth Castro ("Castro") to Christian P. Woolley (hereinbefore called
4 "Woolley") for a contract sale price of \$530,000 (Exs. B-7, B-8 & B-9). The escrow closing was to
5 utilize financing from Intellichoice Mortgage Services, LLC ("Intellichoice") or its designee for
6 100% of the contract sale price (i) in the amount of \$ 424,000.00 secured by a note of even amount
7 and a recorded **first** Deed of Trust secured by the Property in the amount of \$ 424,000.00 (Exs. B-
8 11), and (ii) in the amount of \$106,000.00 secured by a note of even amount and a recorded **second**
9 Deed of Trust secured by the Property in the amount of \$ 106,000.00(Exs. B-12).

10 34. The escrow instructions on April 13, 2006 and at all times prior to June 6, 2006
11 contained no disclosure of any written or other obligation to disburse any funds for any reason to
12 Padilla. The HUD-1 (Exs. B-1) disclosed no such payment to Padilla. TSA, Woolley and the
13 Lender received no disclosure on Exhibit B-1 or from any other source that an instruction was
14 accepted by Ms. Lopez on June 6, 2009 to divert \$100,000.00 from the escrow to Padilla. The
15 record established at hearing confirms that Ms. Lopez failed to provide notification to Lender
16 before, during or after escrow closed on June 7, 2006. Evidence at the Hearing establishes that
17 Intellichoice, the originating mortgage banker, knew and failed to disclose or cause TSA to
18 disclose to its funding source First Franklin that \$100,000 would be diverted from the escrow to
19 Padilla (Exs. B-10).

20 35. Testimony of Stephen Thompson, Vice President Litigation for First Franklin
21 ("Thompson"), established that First Franklin learned about the diversion of \$100,000 from the
22 Castro to Padilla not from the disclosures on the HUD-1 received from TSA but after closing either
23 in discovery or as an Exhibit to this matter (Transcript February 20, 2009, pp. 17, 18 & 19).
24 Thompson testified that the payment of the \$100,000 to Padilla was a fee or charge in direct
25 conflict with closing instruction 2(a) and 14(a) each of which required prior approval from the
26 Lender and that Lender Closing Instructions are important:

27 Q. Do you recognize Exhibit 28?
28

1 A. Yes.

2 Q. What is it? Mr. Thompson, can you tell me what Exhibit 28 is?

3 A. Exhibit 28 appears to be a copy of First Franklin's lender's closing instructions on the
4 first mortgage loan that was issued to Mr. Christian Woolley.

5 Q. And does First Franklin prepare these instructions?

6 A. Yes.

7 Q. Generally speaking, are lender's closing instructions important?

8 Following an objection and ruling by the ALJ:

9 Q. Why?

10 A. Because the lender's closing instructions form the basis of a contract between the lender
11 and the settlement agent on the duties that First Franklin expects an agent to fulfill at the
12 closing of the loan."

13 Thompson's testimony did clarify that First Franklin's closing instructions did not
14 contain a specific instruction regarding what the seller does with their proceeds. However,
15 Thompson stated that the escrow agent had a duty to disclose if they had knowledge that some of
16 that information wasn't true, the escrow agent would have a duty to disclose that to the lender.

17 **Escrow #06118349-041-ML (Escrow No. 3)**

18 36. The escrow opened at TSA on April 19, 2006 under Ms. Lopez as the Escrow Officer
19 and closed on June 9, 2006. The escrow contemplated the transfer of title to the premises
20 commonly identified as 4130 East Cooper Street, Tucson, AZ 85711 (the "Property") from Brian J
21 Peabody and Kristine M. Peabody ("Peabody") to Christian P. Woolley (hereinafter called
22 "Woolley") for a contract sale price of \$555,000 (Exs. D-1). The escrow closing was to utilize
23 financing from Intellichoice Mortgage Services, LLC ("Intellichoice") or its designee for 100% of
24 the contract sale price in the amount of \$ 555,000.00 secured by a note of even amount and a
25 recorded **first** Deed of Trust secured by the Property in the amount of \$ 555,000.00 (Exs. D-8) The
26 Affidavit of property Value prepared by TSA and recorded at the time of title transfer in the Pima
27 County recorder's office shows that box 7 was checked ☒ "To be rented to someone other than
28

1 “family member.”(Exs. D-9). Kathy Heintz a TSA escrow processor and Notary working under
2 Ms. Lopez’s supervision with respect to this escrow notarized both the Affidavit of Property Value
3 and the Affidavit and Agreement of Occupancy for Woolley. No evidence was provided at the
4 Hearing about whether Ms. Heintz or Ms. Lopez sought clarification from the Lender or the
5 Borrower regarding the conflict between the two documents and the lender’s instructions. See the
6 statements of Woolley contained in the Affidavit cited above for further clarification about the lack
7 of veracity regarding his occupancy. The Form 1003 submitted to Intellichoice by Morales on
8 behalf of Woolley represented to Lender that this Property was to be Borrower’s primary residence.
9 (Transcript of February 20, 2009, p. 262 lines 1 - 22).

10 37. At all times prior to June 7, 2006 Lender received no disclosure of any written or other
11 obligation to disburse any funds for any reason to Padilla. The HUD-1 (Exs. D-1) disclosed no
12 such payment to Padilla. TSA, Woolley and the Lender received no disclosure on Exhibit B-1 or
13 from any other source that an instruction was accepted by Ms. Lopez on May 11, 2006 or again on
14 June 7, 2009 to divert \$ 65,000.00 from the escrow to Padilla. The record established at hearing
15 confirms that Ms. Lopez failed to provide notification to Lender before, during or after escrow
16 closed on June 7, 2006. Evidence at the Hearing establishes that Intellichoice, the originating
17 mortgage banker, knew and failed to disclose or cause TSA to disclose to its funding source
18 Meritage Mortgage Corporation that \$ 65,000 would be diverted from the escrow to Padilla (Exs.
19 D-7).

20 **Escrow #06112875-041-ML (Escrow No. 4)**

21 38. The escrow opened at TSA on April 24, 2006 under Ms. Lopez as the Escrow Officer
22 and closed on May 17, 2006. The escrow contemplated the transfer of title to the premises
23 commonly identified as 4600 N. Avenida Del Cazador, Tucson, AZ 85718 (the “Property”) from
24 Rex C. Adams (hereinbefore called “Adams”) to Christian P. Woolley (hereinbefore called
25 “Woolley”) for a contract sale price of \$631,000 (Exs. E-15, E-16). The escrow closing was to
26 utilize financing from Long Beach Mortgage Company (“Long Beach”) for 100% of the contract
27 sale price (i) in the amount of \$504,800.00 secured by a note of even amount and a recorded **first**
28

1 (“Infinity”) or its designee for 75% of the contract sale price in the amount of \$307,500.00 secured
2 by a note of even amount and a recorded **first** Deed of Trust secured by the Property in the amount
3 of \$ 307,500.00 (Exs. F-7).

4 42. Lender received no disclosure of any written or other obligation to disburse any funds
5 for any reason to Balderrama. The HUD-1 (Exs. F-9) disclosed no such payment to Balderrama.
6 TSA, Balderrama and the Lender received no disclosure on Exhibit F-9 or from any other source
7 that an instruction was accepted by Ms. Heintz on April 25, 2006 (Exs. F-15) or previously on
8 April 18, 2009 (Exs. F-15) to divert \$ 102,263.23 from Del Bosque to Balderrama. The record
9 established at hearing confirms that Ms. Lopez failed to provide notification to Lender before,
10 during or after escrow closed on April 25, 2006. Evidence at the Hearing establishes that Infinity,
11 the originating mortgage banker, knew and failed to disclose or cause TSA to disclose to its
12 funding source Axis that \$ 102,263.23 would be diverted from Del Bosque to Balderrama.
13 Lender’s Closing instructions had established a ceiling of 9% for the maximum interested party
14 contribution. The diverted funds exceeded the ceiling by \$ 65,363.23. The excess constitutes an
15 amount equal to 16% above the 9% ceiling required by the Lender. (Exs.F-22). Testimony from
16 Ms. Lopez at the hearing suggested that this was a “mistake”. However, it clearly follows the
17 pattern of disregard for disclosure to the Lender established in each of the above referenced
18 escrows. Ms. Lopez failed to call the Lender and seek clarification before intentionally creating
19 what she characterizes simply as a “mistake”. An escrow veteran of 14 years should surely
20 recognize that she must strictly comply with the clear instructions provided by all parties to the
21 escrow. An instruction that places a nine (9%) percent cap on contributions to interested parties is
22 a very clear limitation that must be adhered to by the escrow officer. If, as in this instance, another
23 16% is required to provide borrower with sufficient funds to close, the escrow agent must get clear
24 amended instructions from the lender and the seller before proceeding to act. When a conflict
25 between an instruction from the Seller and an instruction from the Lender takes place, the escrow
26
27
28

1 Deed of Trust secured by the Property in the amount of \$504,800.00 (Exs. E-8), and (ii) in the
2 amount of \$126,200.00 secured by a note of even amount and a recorded **second** Deed of Trust
3 secured by the Property in the amount of \$126,200.00 (Exs. E-9).

4 39. Lender received no disclosure of any written or other obligation to disburse any funds
5 for any reason to Padilla. The HUD-1 (Exs. E-1) disclosed no such payment to Padilla. TSA,
6 Woolley and the Lender received no disclosure on Exhibit E-1 or from any other source that an
7 instruction was accepted by Ms. Lopez on May 11, 2006 or again on May 15, 2009 (Exs. E-7) to
8 divert \$ 82,000.00 from the escrow to Padilla. The record established at hearing confirms that Ms.
9 Lopez failed to provide notification to Lender before, during or after escrow closed on May 17,
10 2006. Evidence at the Hearing establishes that Intellichoice, the originating mortgage banker, knew
11 and failed to disclose or cause TSA to disclose to its funding source Long Beach that \$ 82,000
12 would be diverted from the escrow to Padilla (Exs. E-5, E-6).

13 40. Lender's Closing Instructions contained the following statement:

14 "RESPA: You are hereby notified that we rely solely upon you to complete and deliver the
15 "HUD-1 Closing Statement" in accordance with the Real Estate Settlement Procedures Act and
16 that a condition of our consent to you escrowing this transaction is that you accept these
17 instructions, complete and deliver "HUD-1 Closing Statement" in accordance with such
18 requirements in order that we not be subject to any claim for, or any damages, liability, or penalty
19 for failure to do such. If you do not accept this condition, return these instructions immediately
20 together with the funding – do not close this loan. (Exs. E-8, E-9)

21 **Escrow #06110423-041-ML (Escrow No. 5)**

22 41. The escrow opened at TSA on February 16, 2006 under Ms. Lopez as the Escrow
23 Officer and closed on April 25, 2006. The escrow contemplated the transfer of title to the premises
24 commonly identified as 1488 E. Tascal Loop, Oro Valley, AZ 85737 (the "Property") from Marco
25 Vinicio Del Bosque (hereinbefore called "Del Bosque") to Ana Elisa Balderrama (hereinbefore
26 called "Balderrama") for a contract sale price of
27 \$ 410,000 (Exs. F-1, F-2). The escrow closing was to utilize financing from Infinity Funding Corp.

1 officer may not act until clear instruction is received from all parties to the escrow¹⁴.

2 43. Ms. Lopez issued a HUD-1 that was neither true nor accurate as her Certification in
3 Exhibit F-16 required. Comparison between Exhibit F-10 the Escrow Ledger Listing and the HUD-
4 1 demonstrates the \$6,000 amount attributed to Seller at Line 506 is pure fiction since Exhibit F-10
5 clearly discloses no funds were received from Seller. Exhibit F-9 indicates that Buyer brought
6 \$102,263.23 to the closing table to fund the amount needed to acquire the \$410,000 Property. In
7 truth, Exhibit F-10 clearly discloses that the only funds brought to the closing table were from the
8 Lender. At the time of closing, Lender had a HUD-1 from this escrow officer that demonstrated a
9 25% equity contribution from the Borrower which was totally fictitious. Ms. Lopez enabled fraud.
10 While the assertion was made at hearing and accepted by the ALJ that no damages occurred. The
11 spectrum of harm from this sort of improper activity on the part of a fiduciary is enormous. Some
12 of the many injuries are the following: the tax assessor builds on erroneous information that
13 established a new valuation for homes built in the same area of the same age. Real people are
14 assessed and ultimately pay inflated taxes based on erroneous information. Appraisals carry the
15 "closed" transaction as a basis for comparative appraisals used to provide financial institutions
16 with true and accurate valuation data. Real Estate agents view the "closed" data and share the news
17 about property value with prospective clients. The actual damage is far too insidious for the
18 Department to ignore due to the intentional nature of the breach of fiduciary duty by Ms. Lopez.
19 Ms. Boggie did not testify that she or TSA discovered this intentional breach of their employee's
20 fiduciary duty in a timely manner.

21 44. The email received by Ms. Lopez makes clear the fact that she failed to disclose the real
22 information that she possessed since it was a source of her business. The text of the email makes it
23 clear that Francisco Del Bosque was "buying by myself"[sic]. Despite all the testimony that Ms.
24 Lopez owned up to a mistake, Ms. Lopez concealed the fact that an employee of the mortgage
25

26
27 ¹⁴ When the "agent should realize the possibility of conflicting interpretations, ordinarily [it] is not authorized
28 to act, since it would be [its] duty to communicate with the principal[s] and obtain more definite instructions." Gardenhire, 11 Ariz.App. at 559, 466 P.2nd at 778 (quoting Restatement (Second) of Agency § 44 comment c)

1 broker that forwarded the transaction to Axis for funding confirmed to her on February 14, 2006
2 (two days before the escrow was opened) that he was utilizing a “straw person” to purchase the
3 property for his own account rather than acquire the Property as community property with his
4 spouse, Krista. No evidence was presented that indicated that this arrangement was ever disclosed
5 to the lender, yet it was safely ensconced in the escrow file examined by Mr. Carpenter. The initial
6 order sheet displays Francisco Del Bosque as the Buyer (Exs. F-1 & F-6). By March 30, 2006 the
7 shift to Ana Balderrama takes place and Exs. F-2, F-3, F-4 & F-5 demonstrate that the switch from
8 Francisco Del Bosque to Balderrama was successful all the way to close of escrow.

9 45. The multiple intentional breaches of fiduciary duty required the close scrutiny that the
10 hearing in this matter provided.

11 **Escrow #06112873-041-ML (Escrow No. 6)**

12 46. The escrow opened at TSA on March 17, 2006 under Ms. Lopez as the Escrow
13 Officer and closed on May 2, 2006. The escrow contemplated the transfer of title to the premises
14 commonly identified as 4550 East Coronado Drive, Tucson, AZ 85718 (the “Property”) from Rex
15 C. Adams (hereinbefore called “Adams”) to Leonard Horner (“L. Horner”) for a contract sale price
16 of \$750,000 (Exs. G-7, G-8). The escrow closing was to utilize financing from WMC Mortgage
17 Corp. (“WMC Mortgage Corp.”) for 100% of the contract sale price (i) in the amount of
18 \$600,000.00 secured by a note of even amount and a recorded **first** Deed of Trust secured by the
19 Property in the amount of \$600,000.00 (Exs. G-1 line 202), and (ii) in the amount of \$150,000.00
20 secured by a note of even amount and a recorded **second** Deed of Trust secured by the Property in
21 the amount of \$150,000.00 (Exs. G-1 line beneath line 202).

22 47. The escrow instructions on March 17, 2006 and at all times prior to April 28, 2006
23 contained no disclosure of any written or other obligation to disburse any funds for any reason to
24 Padilla. The final HUD-1 (Exs. G-1) disclosed no such payment to Padilla. TSA, L.Horner and the
25 Lender received no disclosure on Exhibit G-1 or from any other source that instructions were
26 accepted by Ms. Lopez on April 28, 2009 to divert \$100,000.00 from the escrow to Padilla (Exs.
27 G-4, G-5). The record established at hearing confirms that Ms. Lopez failed to provide notification

1 to Lender after escrow closed on May 2, 2006.

2 48. Ms. Lopez did not issue a check to Seller in the amount of \$209,043.14 as denoted on
3 Exhibit G-1 line 603 (Exs. G-2)¹⁵. Lender instructions from WMC Mortgage Corp. did not
4 authorize payment of \$100,000 from escrow to Padilla.

5 **Escrow #06112857-041-ML (Escrow No. 7)**

6 49. The escrow opened at TSA on March 17, 2006 under Ms. Lopez as the Escrow Officer
7 and closed on May 24, 2006. The escrow contemplated the transfer of title to the premises
8 commonly identified as 202 N. Suntan Drive, Vail, AZ 85641 (the "Property") from Rex C. Adams
9 (hereinbefore called "Adams") to Christian P. Woolley (hereinbefore called "Woolley") for a
10 contract sale price of \$550,000 (Exs. H-8). The escrow closing was to utilize financing from WMC
11 Mortgage Corp. ("WMC Mortgage Corp.") for 100% of the contract sale price (i) in the amount of
12 \$440,000.00 secured by a note of even amount and a recorded **first** Deed of Trust secured by the
13 Property in the amount of \$440,000.00 (Exs. H-2), and (ii) in the amount of \$110,000.00 secured
14 by a note of even amount and a recorded **second** Deed of Trust secured by the Property in the
15 amount of \$110,000.00 (Exs.H-3).

16 50. The escrow instructions on March 17, 2006 and at all times prior to April 28, 2006
17 contained no disclosure of any written or other obligation to disburse any funds for any reason to
18 Padilla. The final HUD-1 (Exs. G-1) disclosed no such payment to Padilla. TSA, Woolley and the
19 Lender received no disclosure on Exhibit H-1 or from any other source that Ms. Lopez would
20 assist in the diversion of \$ 48,944.90 from the escrow to Padilla (Exs. H-4, H-5). The record
21 established at hearing confirms that Ms. Lopez failed to provide notification to Lender after escrow
22 closed on May 24, 2006 that Ms. Lopez had assisted in the diversion of \$ 48,944.90 from the
23 escrow to Padilla. Notably in this instance, the diversion of funds took place in a different manner.
24 Ms. Lopez issued check # 332543 to Adams from escrow on May 24, 2006. Careful examination

25
26 ¹⁵ Exhibit G-1 denotes that Seller was to receive \$209,043.14. Exhibit G-2 demonstrates that Seller received
27 \$110,921.92. Exhibit G-1 at line 303 denotes that Borrower L. Horner provided \$194.28 to the escrow; however
28 Exhibit G-2 demonstrates conflicting information showing that L. Horner had provided \$383.32 to escrow on May 2,
2006.

1 demonstrates that the Escrow funds had been totally disbursed and the escrow was "Closed" The
2 escrow balance reached zero.

3 51. Exhibit H-4 and Exhibit H-5 clearly establish that without instructions from TSA, the
4 Lender or Woolley, Ms. Lopez accepted check # 332543 back into escrow the next business day in
5 order to void the check in the escrow accounting system and reissued a new check # 332615 to
6 Padilla one day after the completed closing.

7 52. Escrow closing instructions from WMC Mortgage Corp. stated the following:

8 **"The final HUD-1 Settlement Statement must be completed at settlement** and must
9 accurately reflect all receipts and disbursements affecting this transaction indicated in these
10 closing instructions and **any amended closing instructions subsequent hereto."**

11 (emphasis added) (Exs.H-2, p. 2 & H-3, p.2)

12 and additionally stated:

13 **"!!!ABSOLUTELY NO CHANGES TO FEES ... DOCUMENTS, INSTRUCTIONS OR**
14 **CONDITIONS** UNLESS IN WRITING FROM WMC MORTGAGE CORP."

15 (Exs. H-2, p.1 and H-3, p.1)

16 Ms. Lopez ignored these clear instructions from Lender. No evidence was provided by Ms.
17 Boggie or Ms. Lopez that TSA management had authorized Ms. Lopez to accept return of a check
18 (issued in accordance with the escrow instructions) for the sole purpose of violating the express
19 term of the escrow instructions.

20 53. Ms. Lopez signed and acknowledged on May 15, 2006 that she as Settlement Agent

21 "(i) accepts and agrees to act strictly in accordance with these Closing Instructions,..."

22 (Exs. H-2, p.6)

23 which also included the following unequivocal instruction:

24 "The undersigned agent agrees that by proceeding with the settlement of this loan, the agent
25 has no knowledge, belief or suspicion that any party involved in this transaction has provided false
26 information or documentation nor intentionally concealed material information during the lending
27
28

1 process. If the agent has any such knowledge, belief or suspicion, the agent must consult the lender
2 prior to continuing the settlement.”

3 The evidence clearly establishes that Ms. Lopez did not act strictly in accordance with
4 the WMC Mortgage Corp. closing instructions. She gave the lender the appearance of having
5 disbursed check # 332543 to Adams from escrow on May 24, 2006 in accordance with the HUD-1
6 and the Lender’s Closing Instructions. She breached both her contractual and fiduciary obligation
7 to WMC Mortgage Corp. by voiding check # 332543 the day after closing and issuing a new check
8 # 332615 to Padilla one day after the completed closing. Since there is no evidence that
9 management of TSA authorized the activity, Ms. Lopez did not act prudently as a fiduciary nor did
10 she keep her contractual obligation to WMC Mortgage Corp.

11 **Seller Designated Proceeds**

12 54. Examiner Carpenter testified that pursuant to Title 6-841.01, A:

13 “ An escrow agent is the trustee of all monies received or collected and held in
14 escrow...”

15 55. Mr. Carpenter also testified that once a transaction has closed and the transaction
16 documents are recorded, until the checks are negotiated by the intended escrow recipients or the
17 wire transfers reach the accounts of the intended recipients the money belongs to the lender.
18 (Transcript March 5, 2009, p. 38, lines 9 - 22)

19 This testimony is consistent with the escrow agent’s fiduciary duty to the lender.

20 56. Ms. Boggie testified that instructions to disburse seller proceeds are indeed normally
21 received by the escrow officer prior to recordation of the closing documents¹⁶ This testimony is
22 consistent with the Department’s position that the escrow officer is the trustee of the lenders funds.

23 57. While Respondent introduced a great deal of testimony suggesting that the escrow
24 industry and indeed the escrow licensee may interpret the conditions under which a seller may
25 redirect funds that are entrusted to the escrow agent in a fiduciary capacity, the testimony of Ms.

26
27 ¹⁶ Ms. Boggie qualified her answer by stating that in rare instances an exception exists allowing a seller to receive
28 money prior to the close of escrow.

1 Lopez, Ms. Boggie and the so-called industry escrow expert are not to be relied upon. The
2 testimony of Ms. Lopez is colored by the fact that she does not appreciate the duties of a prudent
3 person. Her testimony was based on defending what she had done based not on her realization of
4 the responsibilities a fiduciary owes to the parties when stating that a Certification is “true and
5 accurate” but simply following a mechanical and by her own words untrained¹⁷ approach to filling
6 in the blanks on a HUD-1 in order to close a deal.

7 58. Examiner Carpenter testified properly to the principle of law when he stated that the
8 funds entrusted to the fiduciary must reach the parties in the same manner as was Certified to be
9 “true and accurate” on the HUD-1. The seller funds may not be reallocated in a manner that is
10 inconsistent with the escrow instructions, inconsistent with the certification on the HUD-1 that
11 such disbursements are “true and accurate” and by use of a vehicle that remains undisclosed to the
12 escrow officer’s employer, the Borrower and the Lender.

13 59. While Mr. Scott and Ms. Boggie may have testified that neither the buyer nor the lender
14 have any interest in how the seller dispenses with seller’s proceeds once they are the seller’s. They
15 are incorrect. They failed to advise the ALJ that their testimony is materially incorrect. The funds
16 do not become the Seller’s unless and until the escrow disburses them to seller and the seller
17 negotiates the check or takes possession of the wired proceeds in his own separate account. No
18 amount of questionable testimony will change the fact that unless and until the funds pass into the
19 full control of the seller they are still within the control of the escrow agent and must remain
20 protected by the fiduciary.

21 60. The ALJ was misinformed when placing reliance on the testimony of an escrow expert
22 that advised the ALJ that he “had no real Arizona escrow experience”¹⁸ when balancing such
23 “expert testimony” against a seasoned escrow examiner from the Department that has had forty
24

25 ¹⁷ Ms. Lopez testified that she had never read the instructions for the completion of the HUD-1 form, and did not appear to know
26 that any instructions even exist. (Transcript February 18, 2009, p. 283 lines 23 – 25, p. 284 lines 1 – 17)

27 ¹⁸ Mr. Scott admitted he did not have a “deep intimate knowledge” of Arizona escrow practices. (Transcript February
28 20, 2009, p. 64 lines 17 – 20) and he admitted he never worked as an escrow officer in Arizona (Transcript February
20, 2009, p. 112 lines 5 – 7).

1 years of actual Arizona escrow experience.

2 **Disclosure of Seller Designated Proceeds**

3 61. Mr. Carpenter provided testimony that disbursements that Ms. Lopez made to Padilla
4 from the seller's proceeds should have been disclosed on the HUD-1 is accurate and correct. Had
5 Ms. Lopez discharged her fiduciary duties with the prudent level of care required, she would have
6 ascertained the nature of the obligation between the Seller's and Padilla that gave rise to the need
7 to request the escrow agent to make the payment in an undisclosed manner out of the escrow. Once
8 the escrow officer ascertains the nature of the obligation between the seller and Padilla she
9 discharges her fiduciary duty, thereafter, the manner of disclosure and the location of the
10 information on the HUD-1 is made with ease.

11 62. Since the Code of Federal Regulations, Appendix A states that lines 506 through 509 of
12 the HUD-1 may be used to list additional liens or **seller obligations to be paid through**
13 **settlement.** (emphasis added) It is clear that the location on the HUD-1 is not the problem.
14 Disclosing the obligation is indeed the duty for a fiduciary.

15 63. Mr. Granderson, an investigator for the Department that testified that he had a twenty
16 year career working for the Office of the Inspector General of HUD. At HUD Mr. Granderson was
17 a federal auditor. When he testified about the process he has utilized to examine the escrow activity
18 of escrow licensees, he stated that he compares the escrow ledger against the HUD-1 to ensure that
19 the receipts and disbursements correlate exactly.

20 64. Mr. Granderson testified that he examined all the escrow files that were the subject of
21 this matter. He testified that in his opinion, the HUD-1s prepared by Ms. Lopez were inaccurate
22 because they did not disclose the payments to Padilla. Mr. Granderson testified that Padilla's claim
23 to be an investor did not change Ms. Lopez's duty to disclose the payments made to him.

24 65. Examiner Carpenter and Mr. Granderson both testified that seller directed proceeds are
25 to be listed on lines 506-509 according to the Code of Federal Regulations ("CFR"), Appendix A.
26 The fact that the CFR does not specifically use the words "seller directed proceeds" does not
27 change either the fiduciary obligation to accurately disclose such payments or the obligation of the

1 fiduciary to ascertain the nature of the obligation for seller to direct such payment.

2 66. The testimony of both Mr. Scott and Ms. Boggie on the lack of a place on the HUD-1 to
3 disclose "seller directed proceeds" is simply wrongheaded. The CFR clearly allows use of an
4 addendum to provide additional information. There was no evidence that the HUD-1 is designed to
5 defeat disclosure. The testimony of Mr. Scott and Ms. Boggie was not credible on this matter.

6 67. While Ms. Lopez testified that she believes the HUD-1 forms she prepared in Escrow
7 No's 1,2,3,4,6,and 7 were true and accurate, her testimony cannot be taken seriously. Not once can
8 she prove that the funds each HUD-1 denoted were disbursed to each seller in the amount disclosed
9 on the HUD-1.

10 68. While Mr. Scott and Ms. Boggie corroborated the Lopez testimony by opining that the
11 HUD-1s Ms. Lopez prepared were true and accurate. They could only do so by incorrectly
12 suggesting to the ALJ that once the escrow documents were recorded the escrow agent was
13 somehow relieved of its fiduciary duty and thereafter free to follow any redirection of proceeds
14 instruction provided by the seller. The fiction they testified to before the ALJ included an instance
15 in Escrow No. 7 in which absolutely No escrow proceeds reached the seller. In Escrow No. 7 all
16 the proceeds went to Padilla on the day following closing.

17 69. Mr. Scott's testimony that the purpose of RESPA and HUD-1 was to make sure that the
18 borrower and the seller know all of the charges and expenses associated with the close of escrow
19 rather than the lender, ignores the reliance lender's place on the truthfulness and accuracy of the
20 HUD-1. It also requires all who would rely on such incorrect testimony to suspend their
21 understanding of what transpires in an escrow closing. The single largest investor in most every
22 residential closing is the funding lender, indeed testimony and the exhibits provide ample evidence
23 that many of the Lopez escrows in this matter were the subject of 100% financing by the lender.
24 The lender is indeed entitled to the full fiduciary benefit of its contractual arrangement with the
25 escrow provider.

26 70. The testimony of Mr. Mitchell comes about solely by reference to a civil litigation
27 between Biltmore Bank and TSA which is not the subject of the administrative hearing in this
28

1 matter.

2 71. The testimony of Mr. Mitchell is given little, if any weight since he was not opining on
3 behalf of any party to this matter.

4 72. Mr. Scott's testimony that there is nothing in the CFR that requires disclosure of seller
5 designated proceeds is incorrect. While the string of words "seller designated payment" may not
6 appear in the CFR, the instances of seller obligations that are both disclosed on the HUD-1 and
7 commonly handled in escrow are numerous. It is not uncommon for a seller to direct that
8 unsecured creditors be paid from seller proceeds. It is not uncommon for a seller to direct that an
9 obligation not connected with the transferred real estate be paid out of the closing such as a credit
10 card debt. While the string of words "seller designated payment" may not appear in the CFR,
11 escrow agents will show such payments on the HUD-1 and make disclosure and secure escrow
12 instructions from all parties to an escrow in order to accomplish the payment from escrow.

13 73. Ms. Boggie's testimony that neither RESPA nor the HUD-1 requires the reporting of
14 seller designated proceeds to third parties must be weighed against the experience of Mr. Carpenter
15 and Mr. Granderson. On balance the Examiner and former HUD auditor have greater credibility
16 when it comes to interpretation of RESPA and HUD-1.

17 74. Ms. Boggie's testimony that the seller's redirection of proceeds does not constitute a
18 "charge" flies in the face of common sense. If a seller has an obligation to pay an investor it is clear
19 that the obligation cannot be paid unless the account of the seller is charged in the amount needed
20 to satisfy the obligation. The obligation will remain undisclosed if the escrow officer fails to
21 discharge her fiduciary duty to discern the nature of the obligation. If the nature of the obligation is
22 not adequately disclosed to the escrow officer then the escrow officer has an obligation to seek
23 clear instruction from the parties to the escrow. The facts demonstrate that in each of Escrow No's
24 1,2,3,4,5, 6,and 7 the HUD-1s gave the appearance to Borrowers and Lenders that Seller was to
25 receive a specific amount of the proceeds of the escrow. In each of Escrow No's 1,2,3,4,5,6,and 7
26 the seller never received what had been disclosed to borrower and lender. In each of Escrow No's
27 1, 2, 3, 4, 5, 6, and 7 the seller's proceeds were charged to provide the undisclosed diversion of
28 funds. Most importantly, once the escrow agent accepted the obligation to pay the Seller's

1 redirection of proceeds out of the seller's portion of the funds, the irrevocable seller instruction
2 itself constituted a charge which must be paid in order to close the transaction. (Exs. A-13, B-6, D-
3 6, E-6, F-15, and G-5)

4 75. The testimony of Ms. Boggie and Mr. Scott relating to "no space on the HUD-1" for
5 disclosure of the payments to Padilla or Balderrama, or that lines 506 through 509 are not the right
6 place to place such disclosure begs the question: so what does happens if you do "disclose the
7 obligation of the Sellers" into those lines? What calamity befalls the escrow agent? The testimony
8 of Ms. Boggie is confused on this point She stated that she disagrees with the Department's
9 position that lines 506 to 509 would be appropriate for disclosure of the payments to Padilla. Yet,
10 in her testimony she correctly states:

11 "...those are lines to be used for settlement charges, such as payoffs or obligations of the
12 sellers." (Transcript March 5, 2009, p. 157 lines 12 -13)

13 76. The Department's interpretation of the disclosure required by a fiduciary following
14 acceptance of an irrevocable instruction from the seller comes from the testimony of Examiner
15 Carpenter. His testimony based on ten years of examination experience was that payoff of seller
16 obligations should be on Lines 506 to 509 of the HUD-1. Mr. Granderson with four years of
17 auditing experience at HUD and more than two years investigatory experience with the Department
18 testified that according to the Code of Federal Regulations, Appendix A, payment of seller
19 obligations should be disclosed on lines 506 to 509. When asked if the key thing was whether it
20 [seller obligations] need to be disclosed somewhere, Mr. Granderson opined that it has to be
21 disclosed. (Transcript March 5, 2009, p. 110 lines 24 – 25, p. 111 lines 1 - 9)

22 77. Mr. Granderson testified that during the course of an investigation for the Department
23 he conducts for each escrow a comparative review of the HUD-1 against the Escrow Ledger listing
24 containing all the receipts and disbursements to ensure that the receipts and disbursements shown
25 on the Escrow Ledger Listing matches the HUD-1s.

26 78. Mr. Granderson reviewed each of the escrows involved in this matter.

27 79. Mr. Granderson testified that the HUD-1s in this matter should reflect the payments
28

1 made to Padilla in Escrow No's 1, 2, 3, 4, 6, and 7 and similarly the payment made to Balderrama
2 in Escrow No. 5 (Respondent admitted her error in not so doing for Escrow No. 5).

3 80. While both Examiner Carpenter and Mr. Granderson testified that they were not able to
4 identify where in RESPA, the HUD-1 or the instructions for the HUD-1 contained in the Code of
5 Federal Regulations, Appendix A, the word string "seller designated proceeds" appear. They both
6 testified that seller obligations must be disclosed on the HUD-1.

7 81. Mr. Scott testified that he worked in the escrow industry for 50 years; his testimony was
8 accepted by the ALJ as an expert witness. Notably he admitted that he has no Arizona escrow
9 experience. As such, his familiarity with Arizona specific case law and statutory obligations would
10 not allow deep confidence in the application of his actual experience to the facts in this matter. Mr.
11 Scott's testimony regarding the escrow in this matter is not given great weight in light of his
12 admission¹⁹.

13 82. Ms. Boggie and Mr. Scott testified that there is no space in the HUD- for a breakdown
14 of the seller proceeds. If escrow instructions required such a breakdown, the Code of Federal
15 Regulations, Appendix A, provides ample instruction on how to disclose various components of
16 seller or other proceeds. Lack of space on the HUD-1 is not a constraint on the performance of a
17 fiduciary's obligation to disclose. The Code of Federal Regulations permits use of supplemental
18 schedules to add additional disclosure information to the HUD-1.

19 83. Examiner Carpenter testified that the Department's Rules and regulations do not
20 specifically address seller designation of proceeds nor has the Department ever issued any formal
21 policy announcing its position that such disbursements be disclosed on a HUD-1²⁰.

22 84. Ms. Lopez, Ms. Boggie and Mr. Scott all testified that in their opinion the HUD-1s in
23

24 ¹⁹ Administrative Law Judge Decision, No. 09F-BD036-BNK, Page 17, line 21 ("...noted that Mr. Scott has not closed
escrow transactions in Arizona.")

25 ²⁰ The obligation of a fiduciary to act prudently with the escrow property entrusted in escrow, to perform the escrow
26 function without failing to seek clarification from the principals when a conflict exists between the various instructions
27 accepted by the escrow officer into escrow, to not breach the conditions expressed in the various instructions by acting
without clarification; are all obligations that properly trained escrow personnel understand derive from adherence to the
law in Arizona. The acceptance of an escrow license in Arizona by an escrow licensee requires that the licensee
properly train all its personnel in the basis for the fiduciary obligation whether by case decision or statute.

1 Escrow No's 1, 2, 3, 4, 6, and 7 were true and accurate statements of all receipts and disbursements
2 according to the HUD-1s. Their testimony is in stark contrast to that of Examiner Carpenter and
3 Mr. Granderson. Recalling that Mr. Granderson matched the Escrow Ledger Listing against the
4 HUD-1s and found that all the Padilla disbursements had not appeared on the HUD-1s., the
5 truthfulness and accuracy of the disclosure on the seven HUD-1s is clearly wanting²¹.

6 85. Mr. Scott's testimony that during the relevant time period it was standard not to report
7 seller designated disbursements to third parties in the HUD-1 is at least accurate as to the seven
8 escrow files that are the subject of this matter. Even assuming one were to accept Mr. Scott's
9 testimony that neither RESPA , the HUD-1, nor the Code of Federal Regulations, Appendix A-E
10 require such disclosure. Such testimony is not credible. As discussed above, once the fiduciary
11 ascertains the basis for the seller's obligation to pay a third party, ample instructions exist in the
12 Code of Federal Regulations, Appendix A-E²² to permit the required disclosure.

13 86. Grant Mitchell ("Mitchell") testified that the purpose of the HUD-1 is to create
14 transparency and show what parties are receiving what monies, and omitting that a party is
15 receiving [money] creates a blaring inconsistency and skews what the transaction actually was
16 (Exs. T, p. 40 lines 19-22, p. 41 lines 1-2).

17 87. Mr. Mitchell's testimony relating to the fact that the HUD-1 instructions do not
18 establish a legal obligation to break down the seller's proceeds is consistent with the fact that the
19 proceeds must go to the seller in the same fashion as disclosed in the HUD-1. No evidence was
20 submitted that proved that any seller in any of the seven transactions received by check or wire
21 transfer the exact funds that had been disclosed as seller proceeds on any of the seven HUD-1s.
22 The fiduciary obligation of the escrow agent to accurately discharge escrow instruction flows from
23 Arizona law. The Code of Federal Regulations, Appendix A-E provides guidance on the

24
25 ²¹ "...our reading of Berry also leads to the conclusion that it does not permit the escrow agent to close its eyes in the
26 face of known facts and console itself with the thought that no one has yet confessed fraud. Although not required to
27 investigate, when the agent is aware of facts and circumstances that a reasonable escrow agent would perceive "as
evidence of fraud" then there is a duty to disclose. Note, *Escrowee's Duty to Disclose Fraud: An Expansion of the*
Limited Agency Doctrine, 22 ARIZ.L.REV. 1146, 1147 (1980)

28 ²² Exhibit S

1 completion of the HUD-1.

2 88. Mr. Scott also testified that nothing in the Code of Federal Regulations required
3 disclosure of the diversion of seller proceeds to Padilla. As noted above, Mr. Scott would not be
4 familiar with the fiduciary obligations of Arizona escrow agents since he admitted that he has no
5 Arizona escrow experience. His testimony on this issue is given little weight. (Administrative Law
6 Judge Decision, No. 09F-BD036-BNK, Page 17, line 21 "...noted that Mr. Scott has not closed
7 escrow transactions in Arizona.")

8 89. While Ms. Boggie testified that an irrevocable instruction from the seller to pay a third
9 party was not a charge within the meaning of HUD-1 Instructions. She did not testify how such
10 funds could possibly be charged against or removed from the seller's portion of the escrow
11 proceeds without being deemed a "charge". She did not advise whether the escrow was capable of
12 being closed without payment of the charge. She also provided testimony of scant value that lines
13 506 through 509 of the HUD-1 are not the appropriate place to disclose a breakdown of seller
14 funds or distribution of the proceeds to third parties because those lines are for "payoffs or
15 obligations of the sellers." Ms. Boggie failed to explain how an irrevocable instruction to pay a set
16 amount from seller's proceeds to a third party was not an obligation of the seller nor did she testify
17 to any reason other than TSA's business practice, why an escrow officer was permitted to accept
18 such an instruction without disclosing the existence of the instruction to the parties to the escrow in
19 light of the conflict between the certifications and the instructions from the Lenders.

20 90. Ms. Boggie's involvement with several escrow organizations was noted during the
21 hearing but no evidence of what those organizations dispensed during the first half of 2006 by way
22 of educational input to their membership for the issues germane to this matter was provided.

23 91. While Ms. Boggie testified that she did not see anything prior to July 1, 2006 to
24 indicate that disclosure of seller designated proceeds was mandatory or even a recommended best
25 practice, she failed to testify that any change in the law took place eliminating the fundamental
26 duties of a fiduciary in Arizona. Her testimony suggested that HUD or the various organizations
27 she testified that she was a member of were the principal source of guidance on the fundamental
28

1 duties of a fiduciary in Arizona²³.

2 92. Ms. Boggie did testify that it was TSA's policy not to provide a breakdown of seller
3 designated proceeds on the HUD-1s. That testimony establishes that both the "mistake" that Ms.
4 Lopez admitted to in Escrow No. 5 and all the failures to disclose the diversion of seller funds to
5 Padilla were the result of an intentional business practice of TSA.

6 93. Ms. Boggie did confirm in her testimony that the Disbursement of Proceeds form is an
7 escrow instruction. (Transcript March 5, 2009, p.165 lines 20 – 24). Mr. Scott testified that several
8 escrow companies that employed him also had a policy not to require that seller directed
9 disbursements be included on the HUD-1s during the first half of 2006. Mr. Scott's testimony is
10 given little weight on this issue.

11 94. Ms. Boggie testified that TSA's policies relating to seller directed proceeds were
12 changed in August of 2006. She provided no testimony about where on the HUD-1, TSA and Ms.
13 Lopez found the space that by her testimony, Ms. Boggie and Mr. Scott seller designated
14 disbursements are now disclosed.

15 95. The fact that TSA admits that following its August 2006 policy change relating to
16 disclosure of seller designated disbursements, (i) no amendment was made to the HUD-1 form, (ii)
17 no amendment was made to the Code of Federal Regulations, Appendix A – E, or RESPA or was
18 any policy statement issued by HUD to address the policy change. Thus the lack of space on the
19 HUD-1, the lack of guidance in the CFR, Appendix A-E, the lack of a policy statement from HUD
20 and the lack of a policy statement from the Department did not purportedly deter TSA from
21 disclosing seller designated disbursements after August 2006 or alternatively not agreeing to accept
22 Seller instructions to make seller designated disbursements.

23
24 ²³ The "best practice" is the following case decision:

25 The actions of a fiduciary require that the escrow agent must be cognizant not only of the escrow instructions but of the
26 provisions contained in the documents that are deposited in escrow. If there is a significant variance between the two,
27 the escrow agent has a remedy. When the terms of the instruments, or any other fact known to the escrow agent,
28 including the documents deposited in escrow, "present an ambiguity of interpretation as to the intention" of the parties,
the agent has a "duty to call its principal[s] for clarification." *Gardenhire v. Phoenix Title & Trust Co.*, 11 Ariz.App.
557, 559, 466 P.2nd at 776, 778 (1970), *Burkons v. Ticor Title Insurance Company of California*, 168 Ariz. 345, 813
P.2d 710

1 96. Mr. White testified that during the first half of 2006 lenders did not require to be
2 notified about seller designated disbursements. Mr. White's testimony is not supported by the
3 specific instructions from the lender in the seven transactions closed by Ms. Lopez. For example,
4 Ms. Lopez signed and acknowledged on May 15, 2006 that she as Settlement Agent "(i) accepts
5 and agrees to act strictly in accordance with these Closing Instructions..." (Exs. H-2, p.6) which
6 also included the following unequivocal instruction:

7 "The undersigned agent agrees that by proceeding with the settlement of this loan, the agent
8 has no knowledge, belief or suspicion that any party involved in this transaction has
9 provided false information or documentation nor intentionally concealed material
10 information during the lending process. If the agent has any such knowledge, belief or
11 suspicion, the agent must consult the lender prior to continuing the settlement."

12 This is a clear example of a Lender's desire to be notified that Ms. Lopez, the Seller and
13 TSA concealed material information regarding seller designated disbursements among other
14 matters from the Lender.

15 97. Mr. Scott's testimony that (i) during the first half of 2006 lenders did not require to be
16 notified about seller designated disbursements and (ii) never expressed a desire to know about a
17 seller's designation of sale proceeds rings hollow in the face of the clear instructions from each of
18 the Lender's involved in the seven Lopez transactions that are the subject of this matter.

19 98. While Mr. White testified that banks do not rely on the HUD-1 when deciding to fund a
20 loan, Mr. Gaia's testimony made clear that a Lender does require the preliminary HUD-1 to decide
21 whether to fund the loan.

22 99. Contrary to the specific language contained in the Lender Instructions for each of
23 Escrow No.'s 1, 2, 3, 4, 5, 6, and 7, Ms. Boggie and Mr. Scott testified that the Lender Instructions
24 did not require that the Lender be notified. For example, escrow closing instructions from WMC
25 Mortgage Corp. stated the following:

26 "The final HUD-1 Settlement Statement must be **completed at settlement** and must
27 **accurately reflect all receipts and disbursements** affecting this transaction indicated in
28

1 instructions requiring true and accurate statements on the HUD-1 and requiring
2 that the HUD-1s accurately reflect all receipts and disbursements affecting this [the] transaction
3 indicated in these closing instructions and any amended closing instructions subsequent
4 hereto.”(emphasis added)

5 103. While Ms. Boggie at first contended that Disposition of Proceeds and the Irrevocable
6 Assignment of Funds were not escrow instructions or seller obligations, she testified on cross
7 examination that the Disposition of Proceeds and the Irrevocable Assignment of Funds were
8 escrow instructions. (Transcript March 5, 2009, p. 194 lines 22 – 25, p. 195 lines 1 – 3) Ms.
9 Boggie’s testimony that the seller escrow instructions are necessary to close is consistent with the
10 fact that the seven escrows did not close until the seller instructions contained in the Disposition of
11 Proceeds and the Irrevocable Assignment of Funds instructions were fulfilled by Ms. Lopez. Most
12 telling is the fact that in Escrow No. 5 where Ms. Lopez had no Disposition of Proceeds form
13 signed by Seller (it was signed by Ms. Baldarrama, the Buyer) (Exs. F-15), the Seller’s Assignment
14 of Funds instructions (Exs. F-16) were fulfilled by Ms. Lopez. Ms. Lopez admitted this was indeed
15 a breach of her fiduciary duty which she and Ms. Boggie characterized as a “mistake”.

16 104. Ms. Lopez’s witnesses testified in effect that the Disposition of Proceeds forms and
17 the Irrevocable Assignment of proceeds forms are merely directions from the seller as to how the
18 seller’s net sale proceeds were to be distributed after closing occurred and are not charges within
19 the meaning of HUD-1. Such testimony is contradicted by Ms. Boggie’s testimony that the
20 Disposition of Proceeds and the Irrevocable Assignment of Funds were escrow instructions.
21 (Transcript March 5, 2009, p. 194 lines 22 – 25, p. 195 lines 1 – 3)

22 **Duty to Investigate/Red Flag Knowledge of Fraud**

23 105. According to Mr. Carpenter, under A.R.S. § 6-841.01, an escrow officer has a
24 responsibility to be familiar with the documents looked at in performing and handling the escrow
25 transactions, including loan applications, occupancy agreements, and deeds of trust. Mr. Charlton
26
27
28

1 these closing instructions **and any amended closing instructions subsequent hereto.**"

2 (emphasis added) (Exs.H-2, p. 2 & H-3, p.2)

3 and additionally stated:

4 **"!!!ABSOLUTELY NO CHANGES TO FEES ... DOCUMENTS, INSTRUCTIONS**
5 **OR CONDITIONS UNLESS IN WRITING FROM WMC MORTGAGE CORP."**

6 (Exs. H-2, p.1 and H-3, p.1)

7 Lender clearly forbade acceptance by its escrow agent (Ms. Lopez) of amended instructions such as
8 an instruction to divert seller proceeds to a third party without Lender's written consent. Little
9 reliance can be placed on the testimony of Ms. Boggie and Mr. Scott.

10 100. Examiner Carpenter and Mr. Granderson both testified that the Disposition of
11 Proceeds and the Irrevocable Assignment of Funds constitute escrow instructions. While the ALJ
12 contends that Examiner Carpenter and Mr. Granderson cited no legal authority, the record
13 establishes that Examiner Carpenter indeed provided testimony that pursuant to Title 6-841.01, A:

14 "An escrow agent is the trustee of all monies received or collected and held in
15 escrow..."

16 Mr. Carpenter also testified that once a transaction has closed and the transaction
17 documents are recorded, until the checks are negotiated by the intended escrow recipients or the
18 wire transfers reach the accounts of the intended recipients the money belongs to the lender.

19 (Transcript March 5, 2009, p. 38, lines 9 - 22)

20 101. The ALJ wrote in his decision that Examiner Carpenter believes that Ms. Lopez's
21 failure to obtain the Lenders' approval of the Disposition of Proceeds and the Irrevocable
22 Assignment of Funds is a violation of her fiduciary responsibility to the Lenders. In actuality,
23 Examiner Carpenter found that Ms. Lopez's failure to obtain the Lenders' approval of the
24 Disposition of Proceeds and the Irrevocable Assignment of Funds was indeed a violation of her
25 fiduciary responsibility to the Lenders.

26 102. Mr. Scott's testimony that the Disposition of Proceeds and the Irrevocable
27 Assignment of Funds did not require a Lender's approval or signature is undercut by the Lender's

1 explained that the Department holds escrow officers to a "very high standard"²⁴.

2 106. The Department contended that statements made by Mr. Woolley, the buyer in four of
3 the six escrows involving payments to Mr. Padilla, should have alerted Ms. Lopez of suspicious
4 activity. The Department also contended that the concealment of the email that described the
5 "straw buyer" relationship of Ms. Baldarrama from the Lender in Escrow No. 5 was more than a
6 "mistake". These were clear indicators to Ms. Lopez and TSA that something was amiss that
7 should be cleared with each of the Lenders.

8 107. While testimony was given that in 2005-2006 it was common to see groups of buyers
9 or investment groups buying multiple homes over a short period of time. No evidence was
10 introduced to establish that such a fact permitted Ms. Lopez to ignore her fiduciary duties to her
11 escrow parties. She was privy to an arrangement where her escrow files in four instances contained
12 documents that allowed her to prepare Affidavits of Property Value from information contained
13 either on Form 1003's or Occupancy Agreements provided by Lender's for execution at closing.
14 All such documents showed Woolley claiming that the federally financed property was to be his
15 "principal residence". Indeed in one instance the Affidavit of Property Value prepared by Ms.
16 Lopez on the Suntan property contained a blank box seven when the Occupancy Agreement in Ms.
17 Lopez's escrow stated that Woolley would occupy within 60 days. With some coincidence at the
18 hearing, during questioning by Counsel for Respondent, Padilla testified as follows:

19 Transcript of February 19, 2009 hearing, p. 46, lines 3 - 5

20 Q. And that indictment had Count I conspiracy; do you remember that?

21 A. Yes

22 Transcript of February 19, 2009 hearing, p. 46, lines 16 - 19

23
24 ²⁴ The actions of a fiduciary require that the escrow agent must be **cognizant not only of the escrow instructions but**
25 **of the provisions contained in the documents that are deposited in escrow.** (emphasis added) If there is a
26 significant variance between the two, the escrow agent has a remedy. When the terms of the instruments, or any other
27 fact known to the escrow agent, including the documents deposited in escrow, "present an ambiguity of interpretation
28 as to the intention" of the parties, the agent has a "duty to call its principal[s] for clarification." *Gardenhire v. Phoenix*
Title & Trust Co., 11 Ariz. App. 557, 559, 466 P.2nd at 776, 778 (1970), *Burkons v. Tigor Title Insurance Company of*
California, 168 Ariz. 345, 813 P.2d 710

1 Q. And the Suntan – and it explained that part of the indictment

2 With regard to the Suntan property –

3 A. That was my rental property. That's the one I was renting. (emphasis added)

4 108. Mr. Scott testified that in most of the occupancy statements at issue here provided
5 various contingencies, including that the buyer did not have to occupy the property for 60 days,
6 that the property could be occupied by a family member or as a secondary residence, or that the
7 buyer could obtain the lender's consent to waive the occupancy requirement. No evidence was in
8 the escrows files or submitted at the hearing that the Borrower had in any instance sought or
9 obtained Lender approval for property to be occupied by a family member or as a secondary
10 residence or that the Lender had waived the occupancy requirement. Indeed, the Affidavits of
11 Property Value all except the Suntan Affidavit of Property Value stated that the property would be
12 Woolley's primary residence.

13 109. Mr. Charlton, Assistant Superintendent of the Department, testified that the
14 Department proceeds against a person under A.R.S. § 6-161 when the public or the industry
15 licensed by the Department are at risk. Mr. Charlton testified that he pursued this A.R.S. § 6-161
16 Removal and Prohibition action against Ms. Lopez because of her involvement with the multiple
17 disbursements to Mr. Padilla in amounts that "shocked the conscience."

18 110. In Mr. Charlton's opinion, the number of disbursements and the amounts paid to Mr.
19 Padilla was a redflag that should have caused Ms. Lopez to check with a supervisor.

20 111. The Department believes that Ms. Lopez had an opportunity to notice the fraudulent
21 scheme perpetrated by Mr. Padilla and others and potentially stop it in its early stages.

22 112. Examiner Carpenter and Mr. Charlton testified that based on the number of
23 transactions, the sizable amounts disbursed to Mr. Padilla, and the inaccurate information made by
24 Mr. Woolley in four transactions, Ms. Lopez should have made further inquiry into the transactions
25 or taken some action.

26 113. Mr. Scott, Mr. White and Ms. Boggie testified that an escrow officer has NO DUTY
27 to investigate the information contained in the loan documents in the escrow file. Examiner
28

1 Carpenter testified that to the contrary, an escrow officer must indeed be cognizant of the
2 documents that are submitted to the escrow.

3 114. While the ALJ stated that there was no showing of any State or Federal law that
4 specifically provides that an escrow agent has a duty to investigate or verify the representation
5 made by the buyer on the occupancy related documents, concerning their intent to occupy the
6 property, the statement ignores the holding of *Burkons v. Ticor Title Insurance Company of*
7 *California*, 168 Ariz. 345, 813 P.2d 710.

8 115. Examiner Carpenter acknowledged that there is no specific requirement in Arizona
9 law for an escrow officer to do an investigation into each escrow. Ms. Boggie testified that if an
10 escrow officer discovers something suspicious in a transaction, that escrow officer has a duty to
11 contact a manager to discuss the situation but that an escrow officer does not have a duty to
12 investigate every transaction

13 116. The more persuasive evidence on this issue was presented by Examiner Carpenter and
14 Mr. Charlton and the Department's witnesses.

15 117. According to Mr. Charlton, because of the exposure to future harm, it is necessary to
16 ensure that Ms. Lopez is not able to be employed within the licensed industry without first
17 obtaining permission from the Superintendent of the Department

18 118. Both Mr. Scott and Ms. Boggie testified in effect that there was nothing in the escrow
19 files that would have alerted Ms. Lopez to question the transactions. Such statements are not
20 supported by the evidence nor can they be deemed credible.

21 119. Ms. Boggie testified that in her opinion Ms. Lopez is not a threat to the public and
22 her work is being monitored. Ms. Boggie testified that she saw nothing wrong with the failure by
23 Ms. Lopez to disclose the diversion of Seller funds to Padilla. The Department should not rely on
24 the supervision of Management that turns a blind eye to the wrongdoing of a fiduciary. Removal
25 guarantees that no further harm occurs similar to that which impacted the Lenders and the
26 Borrowers in the six Padilla transactions. The harm that took place in Escrow No. 5 (the
27 Baldarrama escrow) has already been addressed above but the harm extends far beyond a simple
28

1 “mistake”.

2 120. The evidence of record established that Ms. Lopez did knowingly participate in the
3 fraudulent scheme perpetrated by Mr. Padilla, Mr. Morales and others regarding Escrow No’s 1, 2,
4 3, 4, 6, and 7. Moreover, the evidence shows that Ms. Lopez knowingly concealed the “straw
5 Buyer” arrangement from the Lender and her employers in Escrow No. 5 (the Balderrama
6 transaction).

7 IRS Form 1099-S

8 121. The Department contended that Ms. Lopez should have issued 1099-S forms to
9 Padilla in Escrow No’s 1, 2, 3, 4, 6, and 7, showing the funds he received as a result of the sale of
10 the respective properties.

11 122. Examiner Carpenter testified that with respect to Escrow No 1, the \$150,000 00
12 payment to Padilla should have been disclosed on a 1099-S form. The evidence of record
13 established that Ms. Lopez caused to be issued 1099-S forms to the sellers (owners of record prior
14 to close of escrow) showing the contract sales price.

15 123. Mr. Ludwig, a certified public accountant, testified as to who should receive a
16 1099-S form in real estate sales transactions such as the six involving Padilla that are at issue in the
17 instant matter.

18 124. Mr. Ludwig testified that seller, the person listed on the title, should be issued a 1099-
19 S showing the gross amount of the sales proceeds.

20 125. Upon review of the files regarding Escrow No’s 1, 2, 3, 4, 6, and 7 and the 1099-
21 S forms Mr. Ludwig determined that the 1099-S forms were issued appropriately.

22 126. The weight of the evidence established that Ms. Lopez appropriately issued the 1099-
23 S forms in Escrow No’s 1, 2, 3, 4, 6, and 7.

24 LAW

25 1. Pursuant to Title 6, Chapter 7, of the Arizona Revised Statutes, the Superintendent has
26 the authority and duty to regulate all persons engaged in the escrow agent business and is to
27 enforce the statutes, rules, and regulations relating to escrow agents.

1 2. The Department bears the burden of proof and must establish Respondent's statutory
2 violations by a preponderance of the evidence.²⁵ "A preponderance of the evidence is such proof as
3 convinces the trier of fact that the contention is more probably true than not."²⁶ A preponderance of
4 the evidence is the greater weight of the evidence, not necessarily established by the greater
5 number of witnesses testifying to a fact but by evidence that has the most convincing force;
6 superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
7 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the
8 other.

9 3. The narratives of Examiner Carpenter are prima facie evidence of the matters contained
10 therein. A.R.S. § 6-129(D) The narratives were admitted into evidence after objection of the
11 Respondent. The narratives establish a fact or may sustain a judgment unless contradictory
12 evidence of sufficient weight is produced. *Barlage v. Valentine*, 210 Ariz. 270, 277, 110 P.3rd 371,
13 378 (App. 2005); *Bayless v. Industrial Commission*, 134 Ariz. 243, 655 P. 2d 363 (App. 1982).

14 4. With regard to the department's allegations, the Department provided credible and
15 reliable evidence and has borne its burden to establish the following violations by a preponderance
16 of the evidence:

17 a. Respondent violated A.R.S. §§ 6-841(B) by failing to maintain adequate escrow
18 file documentation. The following escrows contained no authorization from
19 Borrower or Lender to make disbursements to Padilla. [Exhibit A (Escrow
20 #06112866-041-ML), Exhibit B (Escrow #06115700-041-ML), Exhibit D (Escrow
21 #06118349-041-ML), Exhibit E (Escrow #06112875-041-ML), Exhibit G (Escrow
22 #06112873-041-ML) and Exhibit H (Escrow #06112857-041-ML)];

23 b. Respondent violated A.R.S. § 6-841, 6-834(A) and 6-841.01 by failing to properly
24 account for escrow property by improper disbursement of escrow funds;

25
26
27 ²⁵ See A.R.S. §41-1092.07(G) (2); A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2nd
837 (1952)

28 ²⁶ *Morris K. Udall*, Arizona Law of Evidence § 5 (1960).

specifically:

- i. Respondent violated A.R.S. § 6-834(A) by failing to properly account for escrow property as required by the terms of the escrow; Respondent issued seven HUD-1s that were neither true or accurate as she had certified to Lenders. In one instance, Respondent issued a HUD-1 that was neither true nor accurate as her Certification in Exhibit F-16 required. Comparison between Exhibit F-10 the Escrow Ledger Listing and the HUD-1 demonstrates the \$6,000 amount attributed to Seller at Line 506 is untrue since Exhibit F-10 clearly discloses no funds were received from Seller.
- ii. Respondent violated A.R.S. § 6-834(A) and A.R.S. § 6-841 by failing to disburse funds from the escrows in accordance with the provisions of the HUD-1s. Ms. Lopez failed to disclose to her employer, the Borrower and the Lender that she had either received during the transaction or expected to receive during the transaction an instruction from the Seller to provide a third party known as Padilla with proceeds from the escrow. Moreover, at no time did Respondent cause to appear on any of the HUD-1 settlement statements, disclosure of the payments to Padilla; and
- iii. Respondent violated A.R.S. § 6-834(A) and A.R.S. § 6-841 by failing to follow written escrow instructions. Ms. Lopez failed to heed the specific instruction from the Lender in multiple instances that stated:

“The HUD-1 Settlement Statement must be completed at settlement and must accurately reflect all receipts and disbursements indicated in these closing instructions and any amended closing instructions subsequent hereto.”

or that stated:

“!!!ABSOLUTELY NO CHANGES TO FEES ... DOCUMENTS, INSTRUCTIONS OR CONDITIONS UNLESS IN WRITING FROM WMC MORTGAGE CORP.”

1 Ms. Lopez failed to heed the clear lender instructions for a 9% cap on contributions
2 to the Borrower on Escrow No. 5.

3 5. The Department has provided credible and reliable evidence that Ms. Lopez's conduct,
4 as set forth above, constitutes acts, omissions, and practices which demonstrate personal
5 dishonesty or unfitness to continue in office or to participate in the conduct of the affairs of any
6 financial institution or enterprise and is grounds for removal and the prohibition of Ms. Lopez
7 within the meaning of A.R.S. § 6-161(A)(1).

8 6. The Department has provided credible and reliable evidence that Ms. Lopez's violation
9 of A.R.S. § 6-841(B) constitutes grounds for the removal and prohibition of Ms. Lopez from
10 participating in any manner in the conduct of the affairs of any financial institution or enterprise,
11 pursuant to A.R.S. § 6-161(A) (6).

12 a. The Department has provided credible and reliable evidence that Ms. Lopez's
13 violations of A.R.S. §§ 6-841, 6-834(A) and 6-841.01 constitute grounds for the removal and
14 prohibition of Ms. Lopez from participating in any manner in the conduct of the affairs of any
15 financial institution or enterprise, pursuant to A.R.S. § 6-161(A)(6).

16 b. With regard to the following allegations, the Department did not satisfy its
17 burden of proof to establish the following violations:

18 Respondent did not fail to properly issue 1099-S Forms to Sellers in Escrow
19 No's 1, 2, 3, 4, 6, and 7, and had no obligation to issue 1099-S Forms for Padilla
20 showing the funds he received as a result of the sale of the respective properties.

21 c. The Department has established cause for the Superintendent to order the removal and
22 the prohibition of Ms. Lopez from further participation in any manner as a director, officer,
23 employee, agent or other person in the conduct of the affairs of any financial institution or
24 enterprise, pursuant to A.R.S. § 6-161.

25 **ORDER**

26 **IT IS ORDERED** that Respondent is removed and prohibited from further participation in
27 any manner as a director, officer, employee, agent or other person in the conduct of the affairs of
28

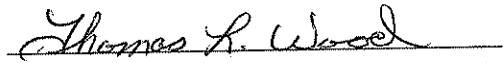
1 any financial institution or enterprise in the State of Arizona pursuant to A.R.S. § 6-161.

2 **IT IS FURTHER ORDERED** that the Official Hearing Record shall be the Reporter's
3 Transcript of Proceedings dated February 18, 19 and 20, 2009 and March 5 and 6, 2009, all
4 admitted exhibits and documents and pleadings filed with the Superintendent and the Office of
5 Administrative hearings.

6 **NOTICE**

7 The parties are advised that this Order becomes effective immediately and the provisions of
8 this Order shall remain effective and enforceable to the extent that, and until such time as, any
9 provision of this Order shall have been modified, terminated, suspended, or set aside by the
10 Superintendent or a court of competent jurisdiction.

11 DATED this 2nd day of September 2009.

12
13 
14 Thomas L. Wood
15 Acting Superintendent of Financial Institutions

16 **SUPERINTENDENT'S ADOPTION, REJECTION AND MODIFICATION OF ALJ'S**

17 **RECOMMENDED DECISION**

18 **The Superintendent adopts in part, rejects in part and modifies in part the Administrative**
19 **Law Judge's Recommended Findings of Fact as follows:**

- 20 1. The Superintendent accepts paragraph 1 through 4 and modifies it by incorporating
21 them into the Superintendent's Final Findings of Fact, Paragraph 1 through 4.
- 22 2. The Superintendent accepts paragraph 5 through 9 and modifies them by incorporating
23 them into the Superintendent's Final Findings of Fact, Paragraph 5 through 9.
- 24 3. The Superintendent accepts paragraph 10 through 15 and modifies them by
25 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 10 through 15.
- 26 4. The Superintendent accepts paragraph 16 through 21 and modifies them by
27 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 16 through 21.

1 5. The Superintendent rejects in part paragraph 22 as follows:

2 a. The ALJ gave no weight to the Morales Affidavit due to Morales assertion of his Fifth
3 Amendment rights, finding Morales' credibility suspect.

4 Since *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, does not forbid adverse
5 inferences against parties to civil actions when they refuse to testify in response to probative
6 evidence offered against them: the [Fifth] Amendment "does not preclude the inference where the
7 privilege is claimed by a party to a Civil cause, accordingly the Superintendent will utilize the
8 Affidavit as credible.

9 b. The Superintendent adopts the balance of Paragraph 22 and modifies them by
10 incorporating it into the Superintendent's Final Findings of Fact, Paragraph 22.

11 6. The Superintendent accepts paragraph 23 through 24 and modifies them by
12 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 23 through 24.

13 7. The Superintendent rejects paragraph 25 for the following reasons:

14 a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared
15 by a court reporter and the exhibits admitted at the hearing.

16 b. The statement is superfluous and of no consequence to the issues.

17 8. The Superintendent accepts paragraph 26 through 27 and modifies them by
18 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 24 through 26.

19 9. The Superintendent rejects in part paragraph 28 as follows:

20 a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared
21 by a court reporter and the exhibits admitted at the hearing for support for the statement that
22 payments were made to Mr. Padilla from the sales proceeds "after the transaction closed."

23 b. The Department proved that the records show (see Escrow Ledger Listings for each
24 Escrow) that all payments to Mr. Padilla came from lender funds in trust with TSA during the close
25 of escrow not after.

26 c. The Superintendent modifies the balance of paragraph 28 after deleting the words "after
27 the transaction closed" into the Superintendent's Final Findings of Fact, Paragraph 27.

10. The Superintendent accepts paragraph 29 and modifies it by incorporating it into the Superintendent's Final Findings of Fact, Paragraph 28.

11. The Superintendent rejects paragraph 30 as follows:

- a. The ALJ finds the testimony of Padilla less credible than that of Ms. Lopez.
- b. Padilla's testimony is no less credible for purposes of paragraph 29 as it is when the ALJ accepts his testimony for paragraph 32 stating Ms. Lopez did nothing wrong.
- c. The Superintendent finds that the testimony regarding Morales' conversation with Ms. Lopez in paragraph 29 as credible and modifies it by incorporating it into the Superintendent's Final Findings of Fact, Paragraph 28.

12. The Superintendent accepts paragraph 31 and modifies it by incorporating it into the Superintendent's Final Findings of Fact, Paragraph 29.

13. The Superintendent rejects paragraph 32 as follows:

- a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared by a court reporter and the exhibits admitted at the hearing for support for the statement that Mr. Padilla had no substantive conversations with Ms. Lopez & that she was not involved.
- b. The Affidavits of Woolley, Horner and others make reference to the fact that Padilla personally attended the closings to make sure he got his checks from Ms. Lopez.
- c. Mr. Padilla would have no meaningful way to evaluate whether Ms. Lopez was aware of what was going on.

14. The Superintendent rejects paragraph 33 as follows:

- a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared by a court reporter and the exhibits admitted at the hearing for support for the statements
- b. The Superintendent strikes the paragraph in its entirety.

15. The Superintendent accepts paragraph 34 through 38 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 30 through 35

1 16. The Superintendent accepts paragraph 39 through 44 and modifies them by
2 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 36 through 41.

3 17. The Superintendent accepts paragraph 45 through 57 and modifies them by
4 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 42 through 55.

5 18. The Superintendent accepts paragraph 58 and modifies it by incorporating it into the
6 Superintendent's Final Findings of Fact, Paragraph 56.

7 19. The Superintendent rejects paragraph 59 as follows:

8 a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared
9 by a court reporter and the exhibits admitted at the hearing for support for the
10 statements

11 b. The Superintendent notes that the Affidavit of Property Value prepared by TSA and
12 recorded at the time of title transfer in the Pima County recorder's office shows that box
13 7 was checked ☒ "To be rented to someone other than "family member."(Exs. D-9).
14 Kathy Heintz a TSA escrow processor and Notary working under Ms. Lopez's
15 supervision with respect to this escrow notarized both the Affidavit of Property Value
16 and the Affidavit and Agreement of Occupancy for Woolley. These documents were
17 part of the escrow file as evidence shows.

18 c. The Superintendent strikes the paragraph in its entirety.

19 20. The Superintendent accepts paragraph 60 through 61 and modifies them by
20 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 57 through 58.

21 21. The Superintendent accepts paragraph 62 through 65 and modifies them by
22 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 59 through 63.

23 22. The Superintendent accepts paragraph 66 through 70 and modifies them by
24 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 63 through 67.

25 23. The Superintendent rejects paragraph 71 as follows:

26 a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared
27 by a court reporter and the exhibits admitted at the hearing for support for the statement
28

1 no one was economically damaged.

2 b. The Superintendent notes that Ms. Lopez enabled fraud. While the assertion was made
3 at hearing and accepted by the ALJ that no damages occurred. The spectrum of harm
4 from this sort of improper activity on the part of a fiduciary is enormous. Some of the
5 many injuries are the following: the tax assessor builds on erroneous information that
6 established a new valuation for homes built in the same area of the same age. Real
7 people are assessed and ultimately pay inflated taxes based on erroneous information.
8 Appraisals carry the "closed" transaction as a basis for comparative appraisals used to
9 provide financial institutions with true and accurate valuation data. Real Estate agents
10 view the "closed" data and share the news about property value with prospective
11 clients. The actual damage is far too insidious for the Department to ignore due to the
12 intentional nature of the breach of fiduciary duty by Ms. Lopez. Ms. Boggie did not
13 testify that she or TSA discovered this intentional breach of their employee's fiduciary
14 duty in a timely manner.

15 c. The Superintendent accepts the balance of the paragraph and modifies it by
16 incorporating it into the Superintendent's Final Findings of Fact, Paragraph 68.

17 24. The Superintendent rejects paragraph 71 as follows:

18 a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared
19 by a court reporter and the exhibits admitted at the hearing for support for the statement
20 Ms. Lopez acknowledged that she made a mistake.

21 b. Ms. Lopez issued a HUD-1 that was neither true nor accurate as her Certification in
22 Exhibit F-16 required. Comparison between Exhibit F-10 the Escrow Ledger Listing
23 and the HUD-1 demonstrates the \$6,000 amount attributed to Seller at Line 506 is pure
24 fiction since Exhibit F-10 clearly discloses no funds were received from Seller.

25 c. The Superintendent strikes Paragraph 72 in its entirety.

26 25. The Superintendent accepts paragraph 73 through 76 and modifies them by
27 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 69 through 72.

26. The Superintendent accepts paragraph 77 through 82 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 73 through 78.

27. The Superintendent accepts paragraph 83 through 86 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 79 through 82.

28. The Superintendent rejects paragraph 87 as follows:

a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared by a court reporter and the exhibits admitted at the hearing for support for the statement that sale proceeds belonged to the seller.

b. The evidence clearly shows that the diversion of funds from the Seller to either Padilla or Balderrama took place while the escrow was funded with trust proceeds from the lenders.

c. No evidence exist for the statement that the Irrevocable Assignment of Funds and Disbursement of Proceeds became “effective after closing”.

d. The Superintendent strikes the paragraph in its entirety.

29. The Superintendent accepts paragraph 88 through 89 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 83 through 84.

30. The Superintendent rejects paragraph 90 as follows:

a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared by a court reporter and the exhibits admitted at the hearing for support for the statement that after the recordation of the deed of trust, the lender does not control the funds, the seller does.

b. Mr. Scott and Ms. Boggie provided no legal authority for their position that after the recordation of the deed of trust, the lender does not control the funds, the seller does.

c. The Superintendent believes the ALJ is in error regarding the obligation of the fiduciary to disburse in strict accordance with the escrow instructions. The Seller in these schemes never took possession of the funds separate and distinct from the lender's trust.

d. The Superintendent strikes the paragraph in its entirety.

31. The Superintendent accepts paragraph 91 through 99 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 85 through 93

32. The Superintendent accepts paragraph 100 through 112 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 94 through 106

33. The Superintendent accepts paragraph 113 through 133 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 107 through 128

34. The Superintendent accepts paragraph 134 through 142 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 128 through 136

35. The Superintendent accepts paragraph 143 through 154 and modifies them by incorporating them into the Superintendent's Final Findings of Fact, Paragraph 137 through 148

36. The Superintendent rejects paragraph 155 as follows:

a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared by a court reporter and the exhibits admitted at the hearing for support for the statement that there was no showing of any State or Federal law that specifically provides that an escrow agent has a duty to investigate or verify the representation made by the buyer on the occupancy related documents, concerning their intent to occupy the property.

b. The actions of a fiduciary require that the escrow agent must be cognizant not only of the escrow instructions but of the provisions contained in the documents that are deposited in escrow. *Gardenhire v. Phoenix Title & Trust Co.*, 11 Ariz.App. 557, 559, 466 P.2nd at 776, 778 (1970), *Burkons v. Ticor Title Insurance Company of California*

c. The Superintendent strikes the paragraph in its entirety.

37. The Superintendent accepts paragraph 156 and modifies it by incorporating it into the Superintendent's Final Findings of Fact, Paragraph 149.

38. The Superintendent rejects paragraph 157 as follows:

a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared by a court reporter and the exhibits admitted at the hearing for support for the statement that supports the statement that mortgage banking and escrow industry witnesses

1 present more persuasive evidence.

2 b. The Superintendent makes the following modification to the original ALJ statement:

3 The more credible testimony was presented by Mr. Carpenter and Mr. Charlton.

4 c. The Superintendent accepts the modified statement that the more credible testimony
5 was presented by Mr. Carpenter and Mr. Charlton and incorporates it into the
6 Superintendent's Final Findings of Fact, Paragraph 150.

7 39. The Superintendent accepts paragraph 158 through 161 and modifies them by
8 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 151 through 154

9 40. The Superintendent rejects paragraph 162 as follows:

10 a. The ALJ makes no citation to the evidentiary records which are the transcripts prepared
11 by a court reporter and the exhibits admitted at the hearing for support for the statement
12 that supports the statement that Ms. Lopez did not knowingly participate in or know of
13 the fraudulent scheme of Padilla, Morales and others.

14 b. The record established six specific instances in which funds were diverted from sellers
15 to Padilla and one instance in which Ms. Lopez admits to intentionally exceeding a
16 Lender contribution cap of 9% cap.

17 c. The Superintendent modifies the text of paragraph 162 to read that Ms. Lopez did
18 knowingly participate in or know of the fraudulent scheme, etc.

19 41. The Superintendent accepts the modified paragraph and modifies it by incorporating it
20 into the Superintendent's Final Findings of Fact, Paragraph 155

21 42. The Superintendent accepts paragraphs 163 through 169 and modifies it by
22 incorporating them into the Superintendent's Final Findings of Fact, Paragraph 156 through 162.

23 **The Superintendent accepts in part, rejects in part and modifies in part the ALJs**

24 **Recommended Conclusions of Law as follows:**

25 1. The Superintendent accepts paragraph 1 and modifies it by incorporating it into the
26 Superintendent's Final Conclusions of Law, Paragraph 1.

27 2. The Superintendent rejects paragraph 2 as follows:

- a. The Department does not have any obligation to show violations of state law as to mortgage brokers.
 - b. The Department must show that Respondent has violated state laws and statutes governing escrow agents.
 - c. The Superintendent modifies the paragraph by inserting the words “escrow agents.” in place of “mortgage brokers A.A.C. R2-19-119”.
 - d. The Superintendent modifies the paragraph by incorporating it into the Superintendent’s Final Conclusions of Law, Paragraph 2.
3. The Superintendent inserts the following statutes affecting escrow agents as Paragraph 3:
- a. A.R.S § 6-841(b) requiring escrow agents to maintain adequate escrow file documentation;
 - i. A.R.S § 6-841, 6-834(A) and 6-841.01 by failing to properly account for escrow property by improper disbursement of escrow funds; specifically:
 - a) A.R.S § 6-834(A) by failing to properly account for escrow property as required by the terms of the escrow;
 - b) A.R.S § 6-834(A) and A.R.S § 6-841 by failing to disburse funds in accordance with the provisions of the HUD-1 escrow; and
 - c) A.R.S § 6-834(A) and A.R.S § 6-841 by failing to follow written escrow instructions;
4. The Superintendent accepts the ALJ’s paragraph 3 and modifies it by incorporating it into the Superintendent’s Final Conclusions of Law, as Paragraph 4.
5. The Superintendent accepts the ALJ’s paragraph 4 and modifies it by incorporating it into the Superintendent’s Final Conclusions of Law, as Paragraph 5.
6. The Superintendent accepts the ALJ’s paragraph 5 and modifies it by incorporating it into the Superintendent’s Final Conclusions of Law, as Paragraph 6.
7. The Superintendent accepts the ALJ’s paragraph 6 and modifies it by incorporating it into the Superintendent’s Final Conclusions of Law, as Paragraph 7.

1 8. The Superintendent adds the law governing grounds for removal and prohibition of
2 individuals from participating in any manner in the conduct of the affairs of any financial
3 institution or enterprise, pursuant to A.R.S. § 6-161(A)(6) as Paragraph 8.

4 9. The Superintendent accepts the ALJ's paragraph 7 and modifies it by incorporating it
5 into the Superintendent's Final Conclusions of Law, as Paragraph 9.

6 10. The Superintendent accepts the ALJ's paragraph 12, 23, 30, 31, and 35, and modifies
7 them by incorporating them into the Superintendent's Final Conclusions of Law, as Paragraphs 10,
8 11, 12, 13 and 14.

9 11. The Superintendent rejects the ALJ's paragraphs 8 through 11 as factually incorrect.
10 Sufficient evidence was introduced to permit a conclusion favorable to the Department's
11 assertions.

12 12. The Superintendent rejects the ALJ's paragraphs 13 through 22 as factually incorrect.
13 Sufficient evidence was introduced to permit a conclusion favorable to the Department's
14 assertions.

15 13. The Superintendent rejects the ALJ's paragraphs 24 through 29 as factually incorrect.
16 Sufficient evidence was introduced to permit a conclusion favorable to the Department's
17 assertions.

18 14. The Superintendent rejects the ALJ's paragraphs 32 through 34 as factually incorrect.
19 Sufficient evidence was introduced to permit a conclusion favorable to the Department's
20 assertions

21 15. The Superintendent rejects the ALJ's paragraphs 37 through 44 as factually incorrect.
22 Sufficient evidence was introduced to permit a conclusion favorable to the Department's
23 assertions.

1 ORIGINAL filed this 2nd day of August, 2009 in the office of:

2 Thomas L. Wood, Acting Superintendent of Financial Institutions
3 Arizona Department of Financial Institutions
4 ATTN: June Beckwith
2910 North 44th Street, Suite 310
Phoenix, Arizona 85018

5 COPY of the foregoing mailed/hand delivered
6 This same date to:

7 Lewis Kowal, Administrative Law Judge
8 Office of Administrative Hearings
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15 Thomas W. Sullivan, Sr. Owner
16 Thomas Sullivan, Jr. President
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Title Security Agency of Arizona
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18 Tucson, AZ 85715

19 AND COPY MAILED SAME DATE by Certified Mail, Return Receipt Requested, to:

20 Monica Lopez
6875 N. Oracle Road, Suite #105
21 Tucson, AZ 85704

22 Michael J. Rusing, Esq.
23 Rebecca K. Obrien, Esq.
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26 BY: June Beckwith
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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Removal and
Prohibition of:

MONICA LOPEZ
6875 N. Oracle Road, Ste. 105
Tucson, AZ 85704

Respondent.

No. 09F-BD036-BNK

**ADMINISTRATIVE
LAW JUDGE DECISION**

HEARING: February 18, 19, and 20, 2009 and March 5 and 6, 2009. Record closed on July 13, 2009 after submission of Proposed Findings of Fact and Conclusions of Law.

APPEARANCES: Assistant Attorney Generals Craig Raby and Erin Gallagher for the Arizona Department of Financial Institutions and Michael Rusing, Esq. and Rebecca O'Brien, Esq. for Monica Lopez

ADMINISTRATIVE LAW JUDGE: Lewis D. Kowal

This action was brought by the Arizona Department of Financial Institutions (Department) to remove and prohibit Monica Lopez (Ms. Lopez) from participating in the conduct of affairs of any financial institution or enterprise without the prior approval by the Superintendent of the Department.

The Department contended that with respect to six escrow transactions, Ms. Lopez failed to notify lenders and disclose seller designated proceeds disbursements made to a third party and, with respect to another transaction, Ms. Lopez failed to follow a lender's closing instruction and failed to account for and disclose a seller's concession.

The Department failed to establish with respect to the seven escrows that Ms.

1 Lopez's conduct violated State law as cited in the Notice of Hearing issued in this
2 matter.

3 The Administrative Law Judge concludes that the action taken by Ms. Lopez with
4 respect to the one escrow involving a seller's concession constitutes a mistake and an
5 aberration of an otherwise clean record of employment as an escrow officer.
6 Consequently, the Administrative Law Judge concludes that the Department did not
7 prevail in this matter.

8 APPLICABLE LAW

9 1. The Real Estate Settlement Procedures Act (RESPA) is a federal consumer
10 protection statute, enacted by Congress in 1974. See Re, 12 U.S.C. § 2601.

11 2. RESPA is incorporated into the terms of the escrow contract and preempts all
12 laws concerning settlement practices that are inconsistent with it. See 12 U.S.C. §
13 2616.

14 3. To implement its consumer protection purpose, RESPA required the Department
15 of Housing and Urban Development (HUD) to develop a standard real estate settlement
16 form that itemizes all charges imposed on the buyer and seller in connection with every
17 transaction involving a federally related mortgage loan. See 12 U.S.C. § 2603 (a)

18 4. 24 Code of Federal Regulations (CFR) Part 355, Appendix A (Appendix A)
19 provides instructions in completing Sections A-L of the HUD-1 that is required pursuant
20 to RESPA and Regulation X of HUD. HUD promulgated Regulation X to carry out
21 RESPA, which included the creation of the HUD-1.

22 5. The Department based the alleged violations on its interpretation of certain
23 language in the lenders' closing instructions and in Appendix A to the HUD-1.

24 6. The HUD-1 Instructions contained in Appendix A to Regulation X provide, in
25 pertinent part:

26 7. Appendix A states:

27 The settlement agent shall complete the HUD-1 to itemize all
28 charges imposed upon the Borrower and the Seller by the
29 Lender and all sales commissions, whether to be paid at
30 settlement or outside of settlement and any other charges
which either the Borrower or the Seller will for at settlement.
Charges to be paid outside of settlement...shall be included on

the HUD-1 but marked "P.O.C." for "Paid Outside of Closing" and shall not be included in computing totals.

8. A.R.S. § 6-161 provides:

A. The superintendent, subject to the requirements of this article, may remove or suspend from office or prohibit from participating in any of the affairs of a financial institution or enterprise any director, officer, employee, agent or other person participating in the conduct of the affairs of the financial institution or enterprise if he finds that the director, officer, employee, agent or other person participating in the conduct of the affairs of the financial institution or enterprise has engaged in any of the following:

1. Any act, omission or practice in any business transaction which demonstrates personal dishonesty or unfitness to continue in office or participate in the conduct of the affairs of the financial institution or enterprise.

* * *

5. Any activity described in 12 United States Code section 1818(e)(1). For the purposes of this paragraph, all references to the appropriate federal banking agency are to the superintendent.

* * *

E. If a removal order has become final, a financial institution or enterprise may not employ the person against whom it was issued without the prior written approval of the superintendent.

9. A.R.S. § 6-834 provides:

A. Unless all of the parties to the escrow otherwise instruct the escrow agent in writing, the escrow agent shall deposit and maintain all monies deposited in escrow to be delivered on the close of the escrow or on any other contingency in a bank, savings bank or savings and loan association doing business in this state and the escrow agent shall keep all of the escrow monies separate, distinct and apart from monies belonging to the escrow agent. Notwithstanding the parties' instructions to the escrow agent, the escrow agent shall not deposit the escrow monies in an institution outside the United States. When deposited, the monies shall be designated as "escrow accounts" or given some other appropriate designation indicating that the monies are not the monies of the escrow agent. These monies shall be deposited immediately on receipt or as soon thereafter as is reasonably practicable.

1 10. A.R.S. § 6-841 provides:

2 A. An escrow agent shall adopt a systematic internal control
3 structure to ensure that persons employed by or associated
4 with the escrow agent's business do not make significant errors
or perpetuate significant irregularities or fraud without timely
detection.

5 B. For purposes of this section, "internal control structure"
6 means the policies and procedures established to provide
7 reasonable assurance that the escrow agent will achieve the
following objectives:

- 8 1. Safeguarding of the customers' assets.
9 2. Reliability in financial reporting.
10 3. Reliability in recording of all escrow transactions.

11 11. A.R.S. § 6-841.01 provides:

12 A. An escrow agent is the trustee of all monies received or
13 collected and held in escrow. ... Every escrow agent and every
14 officer, director and employee of an escrow agent who has
actual knowledge of fraud or dishonesty in the application of
15 escrow monies, owes a fiduciary duty as trustee to the owner
of the monies held in escrow.

16 **FINDINGS OF FACT**

17 **Background**

- 18
- 19 1. At all times relevant to this matter, Ms. Lopez was, and currently is, employed as
20 an escrow officer at Title Security Agency of Arizona (TSA).
- 21 2. At all times relevant to this matter, TSA was licensed by the Department of as an
22 escrow agent.
- 23 3. At all times relevant to this matter, Victoria Boggie (Ms. Boggie) was the
24 manager in charge of TSA's Southern Arizona offices. Ms. Boggie has been employed
25 in the escrow industry for approximately thirty years.
- 26 4. Ms. Lopez has been an escrow agent for approximately fourteen years and has
27 been employed by TSA for about six of those years. Other than the issues addressed
28 herein, Ms. Lopez has not had any complaints or disciplinary action taken against her
29 as an escrow officer.
30

1 5. Richard Carpenter (Mr. Carpenter), an examiner with the Department, has been
2 with the Department for forty years and has been examining escrow agents for the last
3 fifteen years. Mr. Carpenter commenced an examination of TSA's business on
4 November 5, 2007.

5 6. During the course of the above-mentioned examination, Mr. Carpenter became
6 aware of a complaint by Biltmore Bank of Arizona (Biltmore Bank) involving an escrow
7 transaction performed by Ms. Lopez at TSA's Casa Adobe Branch in Tucson, Arizona.
8 Mr. Carpenter expanded the examination of TSA to investigate the above-mentioned
9 complaint.

10 7. The Department's examination and investigation of Ms. Lopez's activities
11 revealed that Ms. Lopez had in escrow transactions:

- 12 a. Failed to account for escrow funds;
- 13 b. Failed to disburse escrow funds in accordance with the provisions of
14 HUD-1 Settlement Statement;
- 15 c. Disbursed escrow funds contrary to the provisions of the HUD-1
16 Settlement Statement;
- 17 d. Failed to maintain an adequate internal control structure mandated by
18 A.R.S. § 6-841;
- 19 e. Failed to follow written escrow instructions;
- 20 f. Disbursed escrow proceeds absent adequate escrow instructions; and
- 21 g. Failed to obtain prior instructions and authorizations for the disbursement
22 of escrow funds to a third party who was not a party to the escrow.

23 8. The Department initiated an action under A.R.S. § 6-161 to remove and prohibit
24 Ms. Lopez from being employed in the industries regulated by the Department,
25 including escrow agents, without obtaining approval from the Superintendent of the
26 Department.

27 9. A hearing was held before the Office of Administrative Hearings, an independent
28 state agency.

29 10. The Department called as witnesses: Mr. Carpenter, a Senior Examiner with the
30 Department; Clyde Granderson (Mr. Granderson), a Department investigator who
investigates mortgage fraud; Ms. Lopez; Anna Valenzuela (Ms. Valenzuela), an escrow

1 officer with Ticor Title Agency (Ticor) who had closed escrows involving payouts made
2 to Mr. Padilla; Tom Morales (Mr. Morales), a mortgage broker involved in fraudulent
3 schemes with Mr. Padilla; Isaac Horner, the buyer of a property known as the North
4 Foothills Drive property; Christopher Woolley (Mr. Woolley), who purchased four
5 properties, all of which involved Mr. Padilla; Jeffrey Gaia (Mr. Gaia), the Chairman and
6 Chief Executive Officer of Biltmore Bank; and Steven Thompson (Mr. Thompson), Vice
7 President of Litigation and Regulatory Counsel for First Franklin Financial Corporation
8 (First Franklin).

9 11. Ms. Lopez called the following witnesses to testify: Kenneth Scott (Mr. Scott), an
10 expert on escrow transactions; Ms. Boggie, Ms. Lopez's supervisor; Daniel White (Mr.
11 White), who was employed in March and April of 2005 for two months as Vice-
12 President of the Texas region for Axis Mortgage & Investments, a division of Biltmore
13 Bank (Axis Mortgage); and Chris Ludwig (Mr. Ludwig), a certified public accountant.

14 12. In all of the transactions below, with the exception of one transaction involving a
15 seller's concession, Escrow # 06110423 (hereinafter referred to as Escrow No. 5), the
16 Department found that disbursements were made to Mr. Padilla and such
17 disbursements were not disclosed to the respective lender or disclosed in the HUD-1
18 Settlement Statements (HUD-1s- which include the Final HUD-1 and a Pre-Audit HUD-
19 1).

20 13. In all of the escrow transactions set forth below, Ms. Lopez acted as an escrow
21 officer and handled the escrow on behalf of TSA. Excluding Escrow No. 5, in the
22 transactions set forth below, Mr. Padilla was not a party to the escrow transactions and
23 payments made to Mr. Padilla were not disclosed to the lenders or disclosed on the
24 HUD-1s.

25 14. All the transactions at issue but Escrow No. 5 contained an Irrevocable
26 Assignment of Funds form that was signed by the respective seller and Mr. Padilla and
27 a Disbursement of Proceeds form signed by the respective seller directing that Mr.
28 Padilla be paid a certain sum (the amounts varied in each transaction) out of the seller's
29 proceeds.

30 15. Ms. Valenzuela was employed as an escrow officer by Ticor from approximately
2003 through February of 2006.

16. Ms. Valenzuela met Mr. Padilla sometime in early 2004. Ms. Valenzuela closed approximately ten escrows in which Mr. Padilla was involved and received seller designated proceeds. Ms. Valenzuela explained that in those transactions neither Mr. Padilla's name nor any disbursements to him appeared on any final HUD-1 she prepared.

17. Ms. Valenzuela testified that in February of 2006 she was required to attend a mandatory seminar concerning mortgage fraud while employed with Ticor. After the seminar, Ticor changed its policy and required that any disbursement of the seller's proceeds must appear on the HUD-1.

18. Ms. Valenzuela testified that additional pages exist in the HUD-1 where further information can be inserted and a disbursement of seller proceeds to a third party could be placed.

19. When Ms. Valenzuela notified Mr. Padilla of the change in Ticor's policy, Mr. Padilla informed her that his name could not be placed on HUD-1s.

20. Ms. Valenzuela did not close any further transactions with Mr. Padilla after the mortgage fraud seminar. Subsequently, Ms. Lopez was contacted by Mr. Morales, a mortgage broker with whom she had a working relationship, who introduced her to Mr. Padilla.

21. It is undisputed that Mr. Morales prepared the loan applications pertaining to Escrow Nos. 1, 2, 3, 4, 6, and 7 as identified below.

22. At hearing, Mr. Morales refused to testify pursuant to his Fifth Amendment rights. The Department submitted into evidence an Affidavit that Mr. Morales signed on August 13, 2008 to settle a civil matter involving him and Biltmore Bank. (Exhibit J). In light of Mr. Morales' asserting his Fifth Amendment rights, Mr. Morales did not testify as to the accuracy of the Affidavit's contents nor did the parties question Mr. Morales. Consequently, Mr. Morales' credibility is suspect and the Affidavit (Exhibit J) is given no weight.

23. Ms. Lopez acknowledged that in Escrow Nos. 1, 2, 3, 4, 6, and 7, she did not disclose on any HUD-1 the seller designated proceeds being paid to Mr. Padilla. Ms. Lopez also acknowledged that she had not read the HUD-1 instructions.

24. Mr. Woolley testified that he purchased approximately five properties in early

2006, four of which are at issue in the instant matter.

25. Mr. Woolley initially testified that Ms. Lopez informed him to make the first two mortgage loan payments during one of the transaction closings. However, upon cross-examination he was unsure if that direction came from Ms. Lopez.

26. Mr. Woolley was aware that Mr. Padilla was to receive funds through all four of the escrow closings but was unaware of the actual amounts until he received the closing documents.

27. Mr. Woolley testified that, contrary to representations that he made in several documents, he did not intend for any of those four properties to be his primary residence.

28. Mr. Padilla testified telephonically from Tucson Federal Camp, where he is currently serving time after pleading guilty to Conspiracy to Commit Wire Fraud, a criminal charge arising out of Escrow No. 7. Mr. Padilla and others, including Mr. Morales, engaged in a fraudulent scheme where buyers were recruited to purchase properties that were 100% financed, payments were made to Mr. Padilla from the sales proceeds after the transaction closed, and subsequently, the buyers defaulted on the loans, causing the properties to be placed in foreclosure.

29. Mr. Padilla testified that during a meeting he had with Mr. Morales, he overheard a telephone conversation between Mr. Morales and Ms. Lopez wherein Mr. Morales stated that they wanted to use her escrow services and that Mr. Padilla required payment through the seller's proceeds but could not appear on the HUD-1. Mr. Padilla further testified that after the telephone call concluded, Mr. Morales informed him that Ms. Lopez had indicated there would be no problem with that arrangement. Ms. Lopez denied that such telephone conversation ever took place.

30. The Administrative Law Judge finds that with respect to the above-mentioned telephone call, Ms. Lopez's testimony is more credible than the testimony of Mr. Padilla, a convicted felon, who engaged in fraud.

31. Mr. Padilla testified that Mr. Morales informed him that the buyers of the properties in question only had to make several mortgage payments in order for Mr. Morales to keep doing business with the same lenders.

32. Mr. Padilla testified in effect that Ms. Lopez did nothing wrong, that he had no

1 substantive conversations with her, and that she was not involved in the fraudulent
2 scheme or "was aware of what was going on." This testimony was corroborated by Ms.
3 Lopez.

4 **ESCROWS AT ISSUE**

5 **Real Estate and Mortgage Industry in 2006**

6 33. During the relevant time, the real estate market in Arizona was booming and it
7 was not uncommon for investors to be involved in multiple sales transactions and
8 escrows. It was also not uncommon for silent investors to be involved in transactions or
9 for seller designated proceeds be paid to third parties at close of escrow. The record
10 indicates that the escrow industry was very busy and escrows were being scheduled
11 and closed quickly. The record reflects that it was not unusual to have the same
12 person or same group of persons buying or selling multiple houses or properties.

13 **Escrows**

14 The Escrows at issue at the instant hearing are as follows:

15 **Escrow #06112866-041-ML (Escrow No. 1)**

16 34. Escrow No. 1 opened March 17, 2006 and closed on April 7, 2006. The escrow
17 involved the sale of property located at 5221 N. Foothills Drive, Tucson, Arizona that
18 was sold by Rex Adams (Mr. Adams) to Isaac Horner. The HUD-1 contract sales price
19 was \$1,300,000.00, of which \$150,000.00 was paid to Mr. Padilla.

20 35. The above-mentioned \$150,000.00 payment to Mr. Padilla was not disclosed on
21 the HUD-1s.

22 36. Isaac Horner testified that in early 2006, he purchased the North Foothills Drive
23 property through his involvement in an investment group that involved Mr. Padilla. Isaac
24 Horner was under the impression that he would receive a portion of the profit once Mr.
25 Padilla's investment group resold the property.

26 37. Isaac Horner was unaware that Mr. Padilla would receive any funds out of the
27 escrow transaction involving the North Foothills Drive property.

28 38. During the transaction closing, it appeared to Isaac Horner that although Ms.
29 Lopez was in charge, a Mr. Bent, who participated with Mr. Padilla in the fraudulent
30 scheme, took over the closing process.

1 39. Specific Closing Instructions for the first and second mortgages state, in
2 pertinent part, "The final HUD-1 Settlement Statement must be completed at settlement
3 and must accurately reflect all receipts and disbursements indicated in these closing
4 instructions and any amended closing instructions subsequent hereto. If any changes to
5 fees occur documents may need to be re-drawn and re-signed". Exhibits A-5 and A-6.

6 40. The Lender's Closing Instructions were issued by Axis Mortgage, a division of
7 Biltmore Bank.

8 41. Mr. Gaia, of Biltmore Bank, testified that after Biltmore Bank funded and sold the
9 loans for the North Foothills Drive transaction, it had to repurchase the loans after they
10 went into default in the fall of 2006. It was only after the loans defaulted that Biltmore
11 Bank became aware of the disbursement made to Mr. Padilla.

12 42. Mr. Gaia testified that, generally, closing instructions are important because the
13 bank needs accurate pre- HUD-1s in order to document what occurred during the
14 transaction, including disbursements.

15 43. Mr. Gaia testified that, to his knowledge, the provisions in the General and
16 Specific Closing Instructions for the North Foothills property was common to all
17 residential real estate transactions closed by Axis Mortgage.

18 44. In Mr. Gaia's opinion, Biltmore Bank did not receive documentation in the closing
19 documents that accurately portrays the North Foothills Drive transaction. However, Mr.
20 Gaia acknowledged that during the relevant time, Biltmore Bank did not instruct title
21 companies to notify the bank of seller designated proceeds payments to third parties
22 when it became known for the first time at closing, which is what occurred. Mr. Gaia
23 testified that Biltmore Bank revised its closing instructions in late May or early June
24 2006 to require such notification.

25 **Escrow #06115700-041-ML (Escrow No. 2)**

26 45. Escrow No. 2 opened April 13, 2006 and closed on June 12, 2006, 2006. The
27 escrow involved the sale of property located at 182 Camino Vista del Cielo, Nogales,
28 Arizona, sold by Jesus and Elizabeth Castro to Mr. Woolley. The HUD-1 contract sales
29 price was \$530,000.00, of which \$100,000.00 was paid to Mr. Padilla. The lender, First
30 Franklin, made two loans to Mr. Woolley for 100% financing of the property.

1 46. Ms. Lopez failed to disclose the \$100,000.00 payout to Mr. Padilla in the final
2 HUD-1.

3 47. The loan applications indicate that the property will be Mr. Woolley's primary
4 residence.

5 48. Mr. Thompson, of First Franklin, testified that based on his review of documents,
6 the final HUD-1 is not an accurate representation of the mortgage loan transaction for
7 the Camino Vista Del Cielo property. Mr. Thompson based that opinion on the fact that
8 the \$100,000.00 disbursement made to Mr. Padilla was not disclosed on the HUD-1.

9 49. According to Mr. Thompson, closing instructions are important because they
10 form the basis of a contract between First Franklin and the settlement agent regarding
11 the duties First Franklin expects the settlement agent to fulfill during the loan closing.

12 50. Provision 2(a) of the Lender's Closing Instructions required the settlement agent
13 to provide a copy of the HUD-1 with all payees as shown on the closing instructions.

14 51. Provision 14(a) of First Franklin's Closing Instructions indicates that other than
15 those fees listed, no other fees or charges may be charged without prior approval of the
16 lender.

17 52. According to Mr. Thompson, the payment to Mr. Padilla is a fee or charge that
18 required prior approval from the lender. In Mr. Thompson's opinion, Ms. Lopez did not
19 comply with the Closing Instructions because Mr. Padilla's payment was not disclosed
20 on the HUD-1.

21 53. Mr. Thompson testified that provision 2(j) of the Lender's Closing Instructions
22 require the settlement agent to provide amended escrow instructions to the lender.
23 Thompson opined that the documents indicating a disbursement to Mr. Padilla are
24 amendments to the escrow instruction that should have been provided to First Franklin.

25 54. Mr. Thompson acknowledged that First Franklin's Closing Instructions in Escrow
26 No. 2 did not provide any specific instruction regarding what the seller intended to do
27 with their sale proceeds.

28 55. First Franklin learned of the Disposition of Proceeds and Irrevocable Assignment
29 of Funds forms directing the disbursement of funds to Mr. Padilla after the loan had
30 closed.

56. Mr. Thompson opined that an escrow agent has a duty to disclose to the lender if

the agent has knowledge that some of the information supplied is not true.

57. As addressed below, the Department contended that based on all of the transactions and representations made by Mr. Woolley regarding his occupancy intentions concerning the properties in four escrows, Ms. Lopez either knew or should have known that the information presented by Mr. Woolley was either inaccurate or suspect.

58. The fact that Mr. Woolley purchased multiple homes in a short period of time and indicated he intended to occupy them was not necessarily unusual during the relevant time period.

59. No credible evidence was presented that Ms. Lopez actually knew that the information submitted by Mr. Woolley with respect to his intention to occupy the properties in the four escrows, including the Del Cielo property, was inaccurate.

Escrow #06118349-041-ML (Escrow No. 3)

60. Escrow No. 3 opened April 19, 2006 and closed on June 9, 2006. The property located at 4130 E. Cooper Street, Tucson, Arizona, was sold by Mr. Adams to Mr. Woolley. The lender, Meritage Mortgage Corporation provided loans to Mr. Woolley for 100% financing of the property. The HUD-1 contract sales price was \$555,000.00, of which \$65,000.00 was paid to Mr. Padilla.

61. The above-mentioned \$65,000.00 payment to Mr. Padilla was not disclosed on the HUD -1s.

Escrow #06112875-041-ML (Escrow No. 4)

62. Escrow No. 4 opened April 24, 2006 and closed on May 17, 2006. the property located at 4600 N. Avenida Dael Cazador, Tucson, Arizona, was sold by Mr. Adams to Mr. Woolley. The lender, Long Beach Mortgage Company, provided Mr. Woolley 100% financing of the property. The HUD-1 contract sales price was \$631,000.00, of which \$82,000.00 was paid to Mr. Padilla.

63. The above-mentioned \$82,000.00 payment to Mr. Padilla was not disclosed on the Final HUD-1.

64. The Lender's closing instructions did not provide for the \$82,000.00 payment to Mr. Padilla out of the escrow funds.

1
2 65. The Lender's instructions provide:

3 RESPA: You are hereby notified that we rely solely upon you to
4 complete and deliver the "HUD-1 Closing Statement" in
5 accordance with the Real Estate Settlement Procedures Act
6 and that a condition of our consent to you escrowing this
7 transaction is that you accept these instruction, complete and
8 deliver "HUD-1 Closing Statement" in accordance with such
9 requirements in order that we not be subject to any claim for, or
any damages, liability, or penalty for failure to do such. If you
do not accept this condition, return theses instructions
immediately together with the funding-do not close this loan.

10 Exhibit E-8.

11 **Escrow #06110423-041-ML (Escrow No. 5)**

12 66. Escrow No. 5 opened February 16, 2006 and closed on April 25, 2006. The
13 escrow involved property located at 1488 East Tascal Loop, Oro Valley, Arizona, sold
14 by Marco Vinico Del Bosque to his mother, Ana Elisa Balderama. The HUD-1 contract
15 sales price was \$410,000.00. There was a seller's concession to buyer in the amount
16 of \$102,263.23. The lender, Biltmore Bank, made loans in the sum of \$410,000.00.

17 67. The HUD-1 was signed by Ms. Lopez on April 18, 2006, certifying that HUD-1 is
18 a true and accurate account of the transaction. Pursuant to the HUD-1, \$161,275.62
19 was to be paid to the seller.

20 68. The Escrow Ledger Listing shows that Ms. Lopez issued a check to the seller in
21 the amount of \$58,485.95. That check contains an amount that is different than what
22 the HUD-1 reflects the seller was to receive.

23 69. The \$102,263.23 reduction in the buyer's contract sales price was not reflected
24 in the Final HUD-1. The offset credit of \$102, 263.23 from the seller's escrow account
25 that was used to pay the buyer's closing costs was not documented or accounted for in
26 the Escrow Ledger Listing, the Final Disbursement Report or documented in the file
27 maintained by Ms. Lopez for TSA.

28 70. Ms. Lopez's disbursement of the \$102,263.23 exceeded the lender's ceiling in
29 the closing instructions and constitutes a disbursement contrary to the Lender's Closing
30 Instructions.

1 71. According to Ms. Lopez, this property was not foreclosed and no one was
2 economically damaged. The property has since been sold and there is currently a new
3 Deed of Trust.

4 72. Ms. Lopez acknowledged that she made a mistake in the handling of Escrow
5 Transaction No. 5. Ms. Lopez accepted responsibility for her actions in that regard and
6 Ms. Boggie is having Ms. Lopez's work monitored.

Escrow #06112873-041-ML (Escrow No. 6)

7 73. Escrow No. 6 opened March 17, 2006 and closed on April 27, 2006. The escrow
8 involved property located at 4550 E. Coronado Drive, Tucson, Arizona sold by Mr.
9 Adams to Leonard Horner. The lender, WNIC Mortgage, made two loans for 100%
10 financing of the property. The HUD-1 contract sales price was \$750,000.00, of which
11 \$100,000.00 was paid to Mr. Padilla.

12 74. The above-mentioned \$100,000.00 payment to Mr. Padilla was not disclosed on
13 the Final HUD-1.

14 75. The Final Escrow Disbursement Report shows that Ms. Lopez issued a check in
15 the amount of \$110,921.92, which is contrary to the Final HUD-1 that indicates seller
16 was to be paid \$209,043.14.

17 76. The Lender's Closing Instructions did not provide for the \$100,000.00 payment
18 to be made to Mr. Padilla.

Escrow #06112857-041-ML (Escrow No. 7)

19 20 77. Escrow No. 7 opened March 17, 2006 and closed on May 24, 2006. The escrow
21 involved property located at 202 N. Suntan Drive, Vail, Arizona sold by Mr. Adams to
22 Mr. Woolley. The lender, WNIC Mortgage, made two loans for 100% financing of the
23 contract price of \$550,000.00.

24 78. Initially the sales proceeds check was issued to the seller for \$48,944.90. The
25 next day, the check was voided and re-issued in Mr. Padilla's name for the full amount
26 of \$48,944.90. The above-mentioned \$48,944.90 payment to Mr. Padilla was not
27 disclosed on the Final HUD-1 Settlement Statement.

28 79. Although Mr. Padilla received 100% of the sale proceeds, the transaction did not
29 raise any concern to Ms. Lopez that something was amiss.
30

1 80. The Lender's closing instructions did not provide for the \$48,944.90 payment to
2 Mr. Padilla.

3 81. The Closing Instructions state that "The final HUD-1 Settlement Statement must
4 be completed at settlement and must accurately reflect all receipts and disbursements
5 affecting this transaction indicated in these closing instructions and any amended
6 closing instructions subsequent thereto. If any changes to fees occur, documents may
7 need to be re-drawn and re-signed." Exhibit H-2 at 2.

8 82. The Closing Instructions also state, "The undersigned agent agrees that by
9 proceeding with the settlement of this loan, the agent has no knowledge, belief or
10 suspicion that any party involved in this transaction has provided false information or
11 documentation nor intentionally concealed material information during the lending
12 process. If the agent has any such knowledge, belief or suspicion, the agent must
13 consult the lender prior to continuing the settlement." Exhibit H-2 at 6.

14 Seller Designated Proceeds

15 83. The Department contended that the payments made to Mr. Padilla in Escrows
16 Nos. 1, 2, 3, 4, 6, and 7 constitute charges, expenses, or commissions that were
17 required to be reported on the HUD-1.

18 84. Mr. Carpenter testified that once a transaction has closed and the transaction
19 documents are recorded passing title, until the checks issued at closing are negotiated,
20 the money belongs to the lender and the lender can stop payment of the check.

21 85. The Department contended that through that point in time, the escrow officer has
22 a fiduciary duty to the lender and acts as a trustee of the funds.

23 86. Ms. Boggie testified that instructions to disburse seller proceeds are normally
24 received by the escrow officer prior to recordation of the deed of trust, and that prior to
25 such recordation, the loan proceeds are still the lenders' property. Ms. Boggie qualified
26 her testimony by stating that an exception exists in rare cases where there is an
27 agreement allowing a seller to receive money prior to the close of escrow.

28 87. Ms. Lopez testified that, at closing, she became aware of the Irrevocable
29 Assignment of Funds and Disbursement of Proceeds. Those documents became
30 effective after closing occurred when the sale proceeds belonged to the seller. Until

1 that time, the funds belonged to the lender that was providing the funds to the
2 purchaser of the property.

3 88. Mr. Scott and Ms. Boggie testified that neither the buyer nor the lender have any
4 interest in how the seller dispenses with the seller's proceeds once they are the seller's.

5 89. Ms. Lopez's witnesses both testified that once the escrow has closed the sales
6 proceeds belong to the seller and the seller may do as the seller wishes with the
7 proceeds. Mr. White testified that at that point, the lender's recourse is to sue for
8 rescission or seek relief through the Deed of Trust.

9 90. The Administrative Law Judge finds that the checks that were issued at closing
10 come from the escrow account and, after recordation of the transaction documents
11 such as a deed of trust, the lender does not control the funds, the seller does.

12 Disclosure of Seller Designation of Proceeds

13 91. Mr. Carpenter testified that payments that Ms. Lopez made to Mr. Padilla from
14 the sellers' proceeds should have been disclosed on the HUD-1. Mr. Carpenter relied
15 on Appendix A to Part 3500 of Section 24 of the Code of Federal Regulations for his
16 opinion that charges such as payments made to Mr. Padilla are required to be reflected
17 on the HUD-1.

18 92. The CFR Appendix A states that Lines 506 through 509 of the HUD-1 may be
19 used to list additional liens or seller obligations to be paid through settlement, and
20 addendums may also be used to provide additional information.

21 93. Mr. Granderson, an investigator for the Department for a little more than two
22 years, testified that he previously worked for the Office of the Inspector General of HUD
23 for about twenty years. At HUD, Mr. Granderson was a federal auditor and then for
24 nearly four years, an assistant regional inspector general, supervising other federal
25 auditors, and reviewing HUD-1s.

26 94. Mr. Granderson explained that during the course of an investigation for the
27 Department, he reviews the general ledger from an escrow company containing all of
28 the receipts and disbursements from the transaction and compares it to the HUD-1 was
29 to ensure that the ledger matches the HUD-1s.

30 95. Mr. Granderson reviewed all of the transactions at issue in this matter.

1 96. Mr. Granderson opined that the HUD-1s should reflect all the charges and
2 disbursements that are part of an escrow transaction. Mr. Granderson viewed the
3 payments made to Mr. Padilla in Escrows Nos. 1, 2, 3, 4, 6, and 7 as charges,
4 expenses or commissions that should have been reflected in the HUD-1s.

5 97. In Mr. Granderson's opinion, the HUD-1s in the above-mentioned escrows was
6 inaccurate because the payments to Mr. Padilla were not disclosed on the HUD-1s.

7 98. According to Mr. Granderson, if a disbursement is made after the pre-audit HUD-
8 1 is issued, another pre-audit HUD-1 should be issued to inform the lender as to what is
9 happening with the transaction. He stated that the same principle regarding disclosure
10 applies to the final HUD-1. Mr. Granderson explained that disclosure is required
11 regardless of whether Mr. Padilla was an investor.

12 99. Mr. Granderson and Mr. Carpenter testified that in the HUD-1, seller directed
13 proceeds are to be listed on lines 506-509. Both Mr. Carpenter and Mr. Granderson
14 acknowledged that neither in RESPA, the HUD-1, or HUD-1 instructions is there a
15 specific reference or direction to list seller designated proceeds to third parties.

16 100. Mr. Scott has worked in the escrow industry for 50 years. During that time, he
17 worked as escrow administrator and has been employed at a number of escrow
18 companies including his own escrow company. Mr. Scott is a past president of the
19 American Escrow Association, has written and taught on various escrow related topics
20 and has conducted and supervised numerous audits.

21 101. Mr. Scott is found to be a qualified expert on escrow transactions although it is
22 noted that Mr. Scott has not closed escrow transactions in Arizona.

23 102. Both Ms. Boggie and Mr. Scott testified that there is no space in the HUD-1 for a
24 breakdown of the seller's proceeds.

25 103. Mr. Carpenter testified that the Department's Rules and Regulations do not
26 specifically address seller designation of proceeds and the Department has never
27 issued any formal policy announcing its position that seller directed distributions must
28 be disclosed on a HUD-1.

29 104. Ms. Lopez testified that in Escrows Nos. 1, 2, 3, 4, 6, and 7, she believed the
30 HUD-1 forms to be accurate. Ms. Lopez acknowledged that she had signed
certifications acknowledging that she had read each HUD-1 and represented that to the

1 best of her knowledge and belief the HUD-1 is a true and accurate statement of all
2 receipts and disbursements made on the account or by her and that the funds had
3 been disbursed according to the HUD-1.

4 105. Mr. Scott and Ms. Boggie both testified that in their opinion the HUD-1s in
5 Escrows Nos. 1, 2, 3, 4, 6, and 7 are accurate.

6 106. Mr. Scott testified that during the relevant time it was the standard in the escrow
7 industry not to report seller designated disbursements to third parties in the HUD-1. Mr.
8 Scott also testified that neither RESPA, neither the HUD-1, nor the HUD-1 instructions
9 require such reporting.

10 107. According to Mr. Scott, the purpose of RESPA and HUD-1 was to make sure that
11 the borrower and seller, rather than the lender, know all of the charges and expenses
12 associated with the close of escrow are disclosed.

13 108. Grant Mitchell (Mr. Mitchell), Biltmore Bank's expert in the civil litigation involving
14 Biltmore Bank, TSA and Ms. Lopez, testified in a deposition that there was no
15 requirement in RESPA, the HUD-1 instructions, or on the HUD-1 itself to disclose seller
16 payments of proceeds to third parties. See Exhibit 4 pg. 83:21-84:5. Mr. Mitchell
17 worked at HUD for many years and assisted in the preparation of some of the HUD
18 documents at issue in this matter.

19 109. Mr. Mitchell came to this conclusion after he was informed that the initial basis
20 for his opinion, that Padilla had been acting as a finder and Lopez had been informed of
21 this fact, was untrue. See *Id.*, at 41:3-16.

22 110. Mr. Mitchell also testified that once the seller's proceeds are designated on line
23 603 of the HUD-1 form, there is no legal obligation to break down the seller's proceeds
24 any further: See *id.* at 86:9-15.

25 111. Mr. Mitchell also acknowledged that the HUD-1 instructions do not explain where
26 to make such disclosure and there is no place to put it on the form even if you wanted
27 to disclose it. See *id.* at 86:5-8.

28 112. Mr. Scott testified that there is no requirement to provide a breakdown of the
29 seller's proceeds designations.
30

1 113. Mr. Scott also testified that there is nothing in the Code of Federal Regulations
2 promulgated under RESPA that requires disclosure of seller-designated payment of
3 proceeds in the HUD-1.

4 114. Ms. Boggie testified that neither RESPA nor the HUD-1 requires the reporting of
5 seller designated proceeds to third parties.

6 115. According to Ms. Boggie only charges required to be paid in order to close the
7 escrow transaction are listed on the HUD-1.

8 116. Ms. Boggie testified that the seller's proceeds do not constitute a "charge" within
9 the meaning of the HUD-1 Instructions. Ms. Boggie further testified that lines 506
10 through 509 of the HUD-1 Settlement Statement are not the appropriate place to
11 disclose a breakdown of seller funds or distribution of the proceeds to third parties,
12 because those lines are for "payoffs or obligations of the sellers."

13 117. Ms. Boggie and Mr. Scott testified that there is no space in the HUD-1 for a
14 breakdown of the seller's proceeds.

15 118. Ms. Lopez's witnesses testified that the only instruction for seller's proceeds is
16 line 603, requiring the gross amount to be paid to seller at settlement.

17 119. Ms. Boggie testified on direct examination that Distribution of Proceeds and
18 Irrevocable Assignment of Funds forms are instructions to distribute proceeds, but they
19 are not actually escrow instructions and are not necessary for the closing of the escrow
20 transaction. However, upon cross-examination Ms. Boggie later testified that the
21 Disbursement of Proceeds form is not an obligation, but is an escrow instruction.

22 120. Ms. Boggie subscribes to industry related periodicals, including RESPA News,
23 Title News, and RESPA News.com the American Land Title Association's web site,
24 maintains business relationships with underwriters, attends seminars and puts on
25 seminars.

26 121. Ms. Boggie testified that prior to July 1, 2006 she did not see anything from any
27 of these organizations or seminars that indicated that disclosure of seller designated
28 proceeds was mandatory under HUD, or even a recommended best practice.

29 122. Ms. Boggie represented that during the time when the escrows at issue took
30 place, the custom and practice of escrow companies in Arizona, including at TSA, was
not to provide a breakdown of seller designated sale proceeds on HUD-1s.

1 123. Mr. Scott, who worked at several different escrow companies, testified that those
2 companies had a policy that seller directed disbursements were not required to be
3 included on HUD-1s and that, as a matter of custom and practice in the escrow
4 industry, seller directed disbursements of sale proceeds were not listed on HUD-1s by
5 escrow agents in the first half of 2006.

6 124. Ms. Boggie testified that the seminar referenced by Ms. Valenzuela was not
7 open to the all escrow agents and officers but was for Chicago Title and Fidelity
8 employees. TSA was not invited to attend and its employees did not attend the
9 seminar.

10 125. Ms. Boggie testified that TSA's policies were verbally changed with respect to
11 seller designated proceeds to third parties in August 2006.

12 126. There is no evidence showing that any amendment was made to the HUD-1
13 form, the HUD-1 instructions, or RESPA to address this situation nor has there been
14 any policy statement issued by HUD in that regard.

15 127. During 2005-2006, Mr. White was the regional vice president of Aegis Wholesale
16 Corporation, a national wholesaler, and was in charge of Arizona, Nevada and New
17 Mexico. In 2006, Mr. White became vice president of Alliance Bank of Arizona in charge
18 of their residential lending department and is currently a consultant.

19 128. Mr. White, who has approximately 14 years of mortgage industry experience,
20 reviewed each of the lender instructions and testified that none of them required to be
21 notified of a seller directed disbursement.

22 129. Mr. Scott testified that during the relevant time, absent a specific request, an
23 escrow agent would not believe that they should inform a lender of seller designation of
24 proceeds.

25 130. Mr. Scott testified that through the end of 2006, lenders did not ever express any
26 desire to know of a seller's designation of sale proceeds.

27 131. Mr. White testified that banks did not rely on the HUD-1 in deciding whether to
28 fund a loan.

29 132. Mr. Gaia testified that a preliminary HUD-1 is prepared prior to escrow closing,
30 but after the loan is approved and the final HUD-1 is prepared after the escrow closes

1 and funding has occurred. The bank does not receive the final HUD-1 until after the
2 loan has closed and been funded.

3 133. Both Ms. Boggie and Mr. Scott testified that the lender instructions for Escrow
4 Nos. 1, 2, 3, 4, 6, and 7 did not require that the lender be notified of a seller designation
5 of proceeds. Each of the lender instructions required the same information regarding
6 charges and costs as the HUD be disclosed.

7 Disposition of Proceeds and Irrevocable Assignment of Funds

8 134. The Irrevocable Assignment of Funds and Disbursement of Proceeds forms
9 were prepared by Ms. Lopez. Those forms were used by escrow agents and Ms. Lopez
10 did not create those forms.

11 135. Mr. Carpenter opined that the Disposition of Proceeds and Irrevocable
12 Assignment of Funds forms constitute escrow instructions for the escrow officer to
13 follow.

14 136. Mr. Carpenter also opined that if the documents are executed after the escrow
15 instructions, then are considered to be amendments to such instructions requiring the
16 lenders to approve and sign off on the documents.

17 137. According to Mr. Carpenter and Mr. Granderson, if the forms are executed after
18 the Pre-HUD-1, then an amended HUD-1 should be executed. However, neither Mr.
19 Carpenter nor Mr. Granderson cited any legal authority that supported that opinion.

20 138. Mr. Carpenter believes that Ms. Lopez's failure to obtain the lenders' approval of
21 the Disposition of Proceeds forms is a violation of her fiduciary responsibility to the
22 lenders.

23 139. Mr. Scott testified that the Disposition of Proceeds form and Irrevocable
24 Assignment of Proceeds form did not require a lender's approval or signature.

25 140. Ms. Lopez did not disclose to the lender the Irrevocable Assignment of Funds or
26 Disposition of Proceeds form to the respective lenders in Escrows Nos. 1, 2, 3, 4, 6,
27 and 7.

28 141. According to Ms. Boggie, the Disposition of Proceeds and the Irrevocable
29 Assignment of Proceeds forms were not escrow instructions, as used in the escrow
30 industry. She further testified that escrow instructions concern things that are germane

1 to the transaction between the buyer and seller, and are necessary the transaction to
2 close.

3 142. Ms. Lopez's witnesses testified in effect that the Disposition of Proceeds forms
4 and the Irrevocable Assignment of Proceeds forms are directions from the seller as to
5 how the seller's net sale proceeds were to be distributed after closing occurred and are
6 not charges within the meaning of HUD-1.

7 Duty to Investigate/Red Flag /Knowledge of Fraud

8 143. According to Mr. Carpenter, under A.R.S. § 6-841.01, an escrow officer has a
9 responsibility to be familiar with the documents looked at in performing and handling the
10 escrow transactions, including loan applications, occupancy agreements, and deeds of
11 trust. Mr. Charlton explained that the Department holds escrow officers to a "very high
12 standard."

13 144. The Department contended that statements made by Mr. Woolley, the buyer in
14 four of the six escrows involving payments to Mr. Padilla, should have alerted Ms.
15 Lopez of suspicious activity.

16 145. On direct examination, Mr. Woolley testified as to his belief that Ms. Lopez
17 instructed him to make sure to make the first two mortgage loan payments at a closing.
18 However, on cross-examination, Mr. Woolley was unsure if another escrow officer
19 made that comment. Mr. Woolley's initial testimony was also controverted by Ms.
20 Lopez, who testified that she did not make such a statement to Mr. Woolley.

21 146. In 2005-2006 it was common to see groups of buyers or investment groups
22 buying multiple homes over a short period of time.

23 147. Mr. Scott testified that in most of the occupancy statements at issue here
24 provided various contingencies, including that the buyer did not have to occupy the
25 property for 60 days, that the property could be occupied by a family member or as a
26 secondary residence, or that the buyer could obtain the lender's consent to waive the
27 occupancy requirement.

28 148. Mr. Charlton, Assistant Director of the Department, testified that the Department
29 proceeds against a person under A.R.S. § 6-161 when the public or the industry
30 licensed by the Department are at risk.

1 149. On behalf of the Department, Mr. Charlton pursued this A.R.S. § 6-161 Removal
2 and Prohibition action against Ms. Lopez because of her involvement with the multiple
3 disbursements to Mr. Padilla in amounts that "shocked-the-conscience."

4 150. In Mr. Charlton's opinion, the number of disbursements and the amounts paid to
5 Mr. Padilla was a "red flag" that should have caused Ms. Lopez to check with a
6 supervisor.

7 151. The Department believes that Ms. Lopez had an opportunity to notice the
8 fraudulent scheme perpetrated by Mr. Padilla and others and potentially stop it in its
9 early stages.

10 152. Mr. Carpenter and Mr. Charlton testified that based on the number of
11 transactions, the sizable amounts disbursed to Mr. Padilla, and the inaccurate
12 information made by Mr. Woolley in four transactions, Ms. Lopez should have made
13 further inquiry into the transactions or taken some action.

14 153. Mr. Scott, Mr. White and Ms. Boggie testified that an escrow officer has no duty
15 to investigate the information contained in the loan documents. Mr. Scott further
16 testified that if the escrow agent were to investigate the escrow agent would be violating
17 his/her impartial third party status.

18 154. Mr. White testified that by the time the loan package goes to an escrow officer,
19 the lending institution's quality assurance division should have reviewed and confirmed
20 information contained in the loan package.

21 155. There was no showing of any State or Federal law that specifically provides that
22 an escrow agent has a duty to investigate or verify the representation made by the
23 buyer on the occupancy related documents, concerning their intent to occupy the
24 property.

25 156. Mr. Carpenter acknowledged that there is no specific requirement in Arizona law
26 for an escrow officer to do an investigation into each escrow.

27 157. The more persuasive evidence on this issue was presented by Ms. Lopez and
28 her witnesses who are engaged in the escrow industry and mortgage banking.
29
30

1 158. According to Mr. Charlton, because of the exposure to future harm, it is
2 necessary to ensure that Ms. Lopez is not able to be employed within the licensed
3 industry without first obtaining permission from the Superintendent of the Department.

4 159. Ms. Boggie testified that if an escrow officer discovers something suspicious in a
5 transaction, that escrow officer has a duty to contact a manager to discuss the situation
6 but that an escrow officer does not have a duty to investigate every transaction.

7 160. Both Mr. Scott and Ms. Boggie testified in effect that there was nothing in the
8 escrow files that would have alerted Ms. Lopez to question the transactions.

9 161. Ms. Boggie testified that in her opinion Ms. Lopez is not a threat to the public and
10 her work is being monitored.

11 162. The evidence of record established that Ms. Lopez did not knowingly participate
12 in or know of the fraudulent scheme perpetrated by Mr. Padilla, Mr. Morales and others
13 regarding Escrow Nos. 1, 2, 3, 4, 6, and 7.

IRS Form 1099-S

14 163. The Department contended that Ms. Lopez should have issued 1099-S forms to
15 Mr. Padilla in Escrow Nos. 1, 2, 3, 4, 6, and 7, showing the funds he received as a
16 result of the sale of the respective properties.

17 164. Mr. Carpenter testified that with respect to Escrow No. 1, the \$150,000.00
18 payment to Mr. Padilla should have been disclosed on a 1099-S form.

19 165. The evidence of record established that Ms. Lopez caused to be issued 1099-S
20 forms to the sellers (owners of record prior to close of escrow) showing the contract
21 sales price.

22 166. Mr. Ludwig, a certified public accountant, testified as to who should receive a
23 1099-S form in real estate sales transactions such as the six involving Mr. Padilla that
24 are at issue in the instant matter.

25 167. Mr. Ludwig testified that seller, the person listed on the title, should be issued a
26 1099-S showing the gross amount of the sales proceeds.

27 168. Upon review of the files regarding Escrow Nos. 1, 2, 3, 4, 6, and 7 and the 1099-
28 S forms, Mr. Ludwig determined that the 1099 forms were issued appropriately.

29 169. The Administrative Law Judge finds that the weight of the credible evidence
30

1 established that Ms. Lopez appropriately issued the 1099-S forms in Escrow Nos. 1, 2,
2 3, 4, 6, and 7.

3 CONCLUSIONS OF LAW

4 Jurisdiction

5 1. Pursuant to A.R.S., Title 6, Chapter 7, the Superintendent of the Department is
6 authorized and has the duty to regulate all persons engaged in the escrow agent
7 business and is to enforce the statutes, rules and regulations applicable to escrow
8 agents.

9 Burden and Standard of Proof

10 2. The Department bears the burden to prove by a preponderance of the evidence
11 that Ms. Lopez has violated State laws pertaining to mortgage brokers. See A.A.C. R2-
12 19-119.

13 3. A preponderance of the evidence is "such proof as convinces the trier of fact
14 that the contention is more probably true than not." Morris K. Udall, ARIZONA LAW OF
15 EVIDENCE § 5 (1960). It is "evidence which is of greater weight or more convincing than
16 the evidence which is offered in opposition to it; that is, evidence which as a whole
17 shows that the fact sought to be proved is more probable than not." BLACK'S LAW
18 DICTIONARY 1182 (6th ed. 1990).

19 Seller Designated Proceeds and Disclosure

20 4. 24 CFR Part 355, Appendix A (Appendix A) provides instructions in completing
21 Sections A-L of the HUD-1 that is required pursuant to RESPA and Regulation X of
22 HUD.

23 5. The Department based the alleged violations on its interpretation of certain
24 language in the lenders' closing instructions and in Appendix A to the HUD-1.

25 6. Appendix A states:

26 The settlement agent shall complete the HUD-1 to itemize all
27 charges imposed upon the Borrower and the Seller by the
28 Lender and all sales commissions, whether to be paid at
29 settlement or outside of settlement and any other charges
30 which either the Borrower or the Seller will for at settlement.
Charges to be paid outside of settlement...shall be included on
the HUD-1 but marked "P.O.C." for "Paid Outside of Closing"
and shall not be included in computing totals.

1 7. The term charge is defined as an obligation, responsibility, expense or cost. See
2 Websters II New Riverside University Dictionary, 249 (Houghton Mifflin Company,
3 1994).

4 8. The Administrative Law Judge concludes that the plain meaning of the term
5 charge in the context of what is the purpose of RESPA and HUD-1 are to be considered
6 as those associated with the real estate sales transaction that must be paid in order to
7 close the transaction.

8 9. Neither the HUD-1 form nor the HUD-1 instructions provide that seller
9 designated proceeds are considered to be an expense, charge or cost associated with
10 the escrow and do not specifically state or provide a place for an itemization of how the
11 seller designated proceeds to be distributed should be disclosed on the HUD-1.

12 10. Mr. Granderson's testimony regarding how HUD interpreted the provisions of
13 HUD-1 form and instruction does not reflect that the Department adopted HUD's
14 interpretation during the relevant time at issue or notified the regulated industry.
15 Likewise, Mr. Carpenter's interpretation of the HUD-1 form and instruction does not
16 reflect that the Department adopted that interpretation during the time at issue or
17 notified the regulated industry.

18 11. While the opinions of Mr. Carpenter and Mr. Granderson may reflect how the
19 Department currently interprets and views the HUD-1 form and instructions, they do not
20 reflect the policy or view of the Department had as of the dates when the transactions
21 at issue occurred. Further, there is no evidence that the Department has formally
22 adopted a policy or informed the regulated industry of its position with respect to seller
23 designated proceeds and whether they need to be reflected on the HUD-1 or disclosed
24 to the lender.

25 12. The Department argued that great weight must be accorded to an agency's
26 interpretation of statutes and regulations. In support of its position, the Department
27 cited case law including *Save Our Valley Ass'n v. Ariz. Corp. Comm'n.*, 216 Ariz. 216,
28 220, 165 P.3d 194, 198 (App. 2007). A review of the applicable case law reveals that
29 in court, an agency's interpretation of its own laws should be accorded great weight.
30

1 13. The Administrative Law Judge does not find the case law cited in support of the
2 above-contention to be on point. The weight of the evidence of record does not
3 establish that the Department either drafted or took part in the promulgation or
4 enactment of RESPA, the HUD-1 Form or the HUD-1 instructions.

5 14. Ms. Lopez relied upon the reported case of *Chicago Title Ins. V. Home Loan*
6 *Corp.*, 2007 WL 2239263 (Tex. App. 2007) wherein the Texas Appellate Court held that
7 seller designated proceeds to a third party was not required to be disclosed on a HUD-

8 15. Although the decision was depublished as a condition of settlement, Ms. Lopez
9 maintained that the court's reasoning in that decision should be applied in the instant
10 matter.

11 16. The Administrative Law Judge concludes that the decision in *Chicago Title*, due
12 to its depublished status, can not be considered as legal authority on the issue of
13 whether HUD-1 requires disclosure of seller designated proceeds and the
14 Administrative Law Judge has determined that issue without consideration of *Chicago*
15 *Title*.

16 17. There were no written closing instructions for the HUD-1s, written directives from
17 the lenders, and no policies or statutes that specifically addressed the disbursement of
18 seller designated proceeds out of escrow to a third party issued by HUD or the
19 Department.

20 18. The Administrative Law Judge concludes that neither Appendix A nor the HUD-1
21 forms (Pre-Audit and Final) required the disclosure of seller directed proceeds to third
22 parties during the time period at issue. Consequently, the lenders' instructions at issue
23 herein that referred to requirements of RESPA and HUD-1, are determined to not have
24 required such disclosure by Ms. Lopez.

25 19. The Administrative Law Judge concludes that the Department did not prove by a
26 preponderance of the evidence that the failure to reflect in the HUD-1s the above-
27 mentioned disbursements to Mr. Padilla or Ms. Lopez's failure to notify the respective
28 lenders of such disbursements in Escrows Nos. 1, 2, 3, 4, 6 and 7 violated State law.
29
30

Breach of Fiduciary Duty

20. The evidence of record established that before a Pre-HUD-1 is prepared the lender has already decided whether to approve a loan.

21. The evidence of record also established that the lenders already funded the loans by the time the final HUD-1 is prepared.

22. The weight of the evidence of record shows that the regulated industry did not report to the lender or that on the HUD-1 seller designated proceeds to third parties were disclosed during the relevant time.

23. The fact that there is a place where one may place such information is not controlling, it is whether the HUD-1 form either directs, the instructions to the HUD-1 form provides, or that RESPA or State law requires such disclosure.

24. The Administrative Law Judge concludes that once the transaction has closed and the transaction documents including the Deed of Trust have been recorded, the funds belong to the seller.

25. Even the Department's witness, Ms. Valenzuela, testified that it was common practice in the escrow industry to handle seller designated proceeds in the manner that Ms. Lopez did. Further, the Department did not provide any notice or inform the regulated industry that disbursing seller designated proceeds to third parties must be disclosed to lenders and set forth in the HUD-1.

26. Under the particular facts and circumstances, there is no evidence that at the time when the activities at issue were being performed by Ms. Lopez that the custom and practice of escrow agents and escrow officers in Arizona were acting in a manner different than Ms. Lopez's conduct with respect to the reporting of seller designated proceeds to third parties. In fact, the evidence of record showed that this was a common occurrence and was so common that forms for the Disposition of Proceeds and Irrevocable Assignment of Funds were being utilized by escrow agents such as TSA.

27. The evidence of record established that Ms. Lopez was a person who up until this point in time had not had any complaints with respect to her work as an escrow officer. Although the Department showed that Ms. Lopez did not read the HUD-1

1 instructions, there was no evidence showing that the instructions contained specific
2 language that included the activities in question. It is the Department's interpretation of
3 the instructions that the Department relies upon, among other things, which was not
4 made known to Ms. Lopez or other escrow agents or officers during the relevant time.

5 28. The Administrative Law Judge concludes that Ms. Lopez's completion of the
6 HUD-1s with respect to Escrow Nos. 1, 2, 3, 4, 6, and 7 was, in compliance to TSA's
7 policy at the time, in accordance with what was the custom and practice of escrow
8 agents during the period 2005-2006, and not in violation of any State law. Ms. Lopez's
9 certification to the lenders that the HUD-1s were correct and did not violate State law
10 because they were accurate. Under the circumstances, Ms. Lopez was not required to
11 amend the escrow instructions or advise the lenders of the disbursements to Mr. Padilla
12 with respect to Escrows Nos. 1, 2, 3, 4, 6, and 7. Consequently, Ms. Lopez did not
13 breach any fiduciary duty with respect to those escrows.

14 Red Flag and Knowledge of Fraudulent Scheme

15 29. With respect to the fraudulent scheme that occurred with respect to Escrow Nos.
16 1, 2, 3, 4, 6, and 7, it was only after the fact, in hindsight, that it became apparent that
17 there was a fraudulent scheme involving Mr. Padilla. However, there is no evidence
18 that Ms. Lopez was involved or knew of the fraudulent scheme.

19 30. The Department asserts that at the time when these transactions occurred, Ms.
20 Lopez was aware of facts that should have alerted her to a fraudulent scheme and, at
21 the very least, addressed the transactions with a supervisor.

22 31. According to the Department, Ms. Lopez "turned a blind eye" which if call the
23 transactions were called into question would have prevented the fraudulent scheme
24 from continuing.

25 32. Under the particular facts and circumstances, the Administrative Law Judge
26 concludes that during the relevant time period, it was not unusual for persons to have
27 multiple deals and have silent investors. Given the context of how and when these
28 transactions occurred, except for Escrow No. 5, all of the other transactions involving
29 Mr. Padilla were of such nature that they would not raise a red flag or cause concern.

30 33. The weight of the evidence of record established that the escrow files of Escrows

Nos. 1, 2, 3, 4, 6, and 7 do not contain information that during the relevant time would have caused an escrow agent to question the nature of the transactions.

34. There was no credible evidence that established Ms. Lopez knew or should have known of the fraudulent schemes perpetrated by Mr. Padilla and others.

IRS 1099-S Forms

35. The weight of the evidence did not support the Department's allegation that Ms. Lopez did not properly issue 1099-S forms in Escrows Nos. 1, 2, 3, 4, 6, and 7.

Escrows Nos. 1, 2, 3, 4, 6, and 7

37. With respect to Escrows Nos. 1, 2, 3, 4, 6, and 7, the Department failed to prove by a preponderance of the evidence that Ms. Lopez violated the provisions of A.R.S. §§ 6-834(A), 6-841, 6-841(B), or 6-841.01.

36. The weight of the evidence of record established that Ms. Lopez's conduct, as set forth above with respect to Escrows Nos. 1, 2, 3, 4, 6, and 7, does not constitute acts, omissions, and practices which demonstrate personal dishonesty and unfitness to continue in office or to participate in the conduct of the affairs of any financial institution or enterprise within the meaning of A.R.S. § 6-161(A)(1).

37. The weight of the evidence of record established that Ms. Lopez's conduct with respect to Escrow Nos. 1, 2, 3, 4, 6, and 7, does not constitute acts, omissions, and practices which demonstrate personal dishonesty and unfitness to continue in office or to participate in the conduct of the affairs of any financial institution or enterprise within the meaning of A.R.S. §§ 6-161(A) (1) and 6-161(A)(6).

38. Ms. Lopez's conduct, as set forth above with respect to Escrows Nos. 1, 2, 3, 4, 6, and 7 does not constitute grounds for the prohibition of Ms. Lopez from participating in any manner in the conduct of the affairs of any financial institution or enterprise within the meaning of A.R.S. § 6-161.

Escrow No. 5

39. With respect to Escrow No. 5, Ms. Lopez failed to maintain adequate escrow file documentation. However, the Department cited that such conduct violated A.R.S. § 6-841(B), which defines the internal control structure that an escrow agent is required to adopt pursuant to A.R.S. § 6-841(A). The weight of the evidence of record did not establish that Ms. Lopez violated the provisions of A.R.S. § 6-841(B).

1 40. The weight of the evidence of record did not establish that Ms. Lopez violated
2 the provisions of A.R.S. §§ 6-834(A), 6-841 or 6-841.01.

3 41. The weight of the evidence of record established that Ms. Lopez's conduct with
4 respect to Escrow No. 5, does not constitute acts, omissions, and practices which
5 demonstrate personal dishonesty and unfitness to continue in office or to participate in
6 the conduct of the affairs of any financial institution or enterprise within the meaning of
7 A.R.S. §§ 6-161(A) (1) and 6-161(A)(6).

8 42. It appears that Ms. Lopez's conduct with respect to Escrow No. 5 was a mistake
9 in which no harm occurred and an aberration of an otherwise good record of
10 employment of 14 years as an escrow officer and her work has since is being
11 monitored.

12 43. Such conduct does not warrant the removal and prohibition of Ms. Lopez from
13 the industries regulated by the Department in an A.R.S. § 6-161 action.

14 44. Although the Superintendent of the Department has the authority to order
15 prohibition of Ms. Lopez further participation in any manner as a director, officer,
16 employee, agent or other person in the conduct of the affairs of any financial institution
17 or enterprise pursuant to A.R.S. § 6-161, the Administrative Law Judge concludes that
18 in this matter, there is insufficient evidence to warrant such action and the Department
19 did not meet its burden of proof in that regard.

20 **ORDER**

21 Based upon the above, no action shall be taken against Ms. Lopez with respect
22 to this matter.

23 Done this day, July 24, 2009.

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26 Lewis D. Kowal
27 Administrative Law Judge
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3 Original transmitted by mail this
4 29 day of July, 2009, to:

5
6 Felecia A. Rotellini, Superintendent
7 Arizona Department of Financial Institutions
8 ATTN: Susan Longo
9 2910 N. 44th Street, Suite 310
10 Phoenix, AZ 85018

11 By Chris Fishler
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